Consolidated Biscuit Co. *and* Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, AFL–CIO, CLC. Cases 8–CA–33402, 8–CA–33502–2, 8–CA–33630, 8–CA–33645, 8–CA–34040, and 8–RC–16402

April 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On January 14, 2004, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party filed answering briefs, and the Respondent filed reply briefs. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified and set forth in full below.[2]

The Bakery, Confectionary, Tobacco Workers and Grain Millers Union (the Union) and its supporters began campaigning in front of the Respondent Consolidated Biscuit Company's facility in McComb, Ohio, on May 21, 2002.[3] In an election held on August 15, 286 votes were cast for, and 485 votes against, the Union. The Union filed objections to the election and unfair labor practice charges. The judge found that the Respondent committed a number of unfair labor practices during the organizing campaign and after the election. As set forth below, we affirm in part and reverse in part the judge's unfair labor practice findings.

I. 8(a)(1) ALLEGATIONS

We adopt the judge's findings that the Respondent violated Section 8(a)(1) through the following conduct: telling employees not to talk about the Union on company time; suggesting to employees that supporting the Union would be futile;[4] instructing security guards to call police at the first sign of union activity and calling the police to the facility; telling Cheri Todd that she could not be a fill-in lead because of her union activity; threatening employees with loss of benefits, plant closure, and stricter discipline if they supported the Union;[5] telling

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We grant the General Counsel's exceptions to the judge's failure to provide for certain standard remedies in accord with his findings. We shall modify the judge's recommended Order to conform to our findings herein. We shall also substitute a new notice in accordance with the Order as modified.

In the absence of explicit exceptions and in light of our findings herein, we adopt the judge's recommended Order setting aside the election and directing a second election.

Chairman Battista and Member Walsh adopt the judge's recommended broad cease-and-desist order, to which no exceptions were filed. Member Schaumber dissents from the issuance of a broad cease-and-desist order. As fully set forth in his dissenting opinion in *Postal Service*, 345 NLRB No. 25 (2005), the Supreme Court has made clear that broad orders must be reserved for egregious cases in which the violations are so severe or so numerous and varied as to truly manifest a general disregard for employees' fundamental employee rights. *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941); *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). In his view, this is not such a case.

[3] All dates are in 2002, unless otherwise indicated.

[4] In adopting the judge's finding that the Respondent unlawfully suggested to Tyrone Holly that supporting the Union would be futile, we rely on the statements of Supervisor Diane Tate. We note that although these statements were pled as threats of plant closure and loss of benefits, they were litigated as threats of futility and the Respondent does not except on a procedural basis. We find it unnecessary to pass on the judge's finding with respect to the statements of Supervisor Margie Brown because such a finding would be cumulative and would not materially affect the remedy for this unlawful conduct. However, we reverse the judge's finding with respect to the statements of Supervisor Yolanda Manns. Contrary to the judge, we find that the context of the conversation between Manns and Holly, including Manns' reference to personal knowledge of her husband's experiences working for a unionized employer, demonstrates that Manns was merely expressing a personal opinion that contained no threats of futility.

[5] Chairman Battista agrees with the judge's finding that Supervisor Susan Henry unlawfully threatened loss of benefits. However, he would reverse the finding that the Respondent's President James Appold also threatened loss of benefits in his preelection speech to employees. In the Chairman's view, Appold made clear in his speech that any loss of current benefits would occur in the context of the "give and take" of collective bargaining. Members Schaumber and Walsh adopt the judge's finding that Appold threatened employees with loss of benefits in his preelection speech. They find that Appold's statements about bargaining "from zero" and "with a clean slate" and that employees would "probably lose" certain named benefits, which echoed the Respondent's consistent message throughout the campaign, support the judge's finding.

The Chairman also agrees that Supervisor James Keller unlawfully threatened plant closure. He finds it unnecessary to pass on whether Supervisor Dennis Herod's statements about moving production lines was unlawful inasmuch as such a finding would be cumulative and would not materially affect the remedy.

Cathy Hill that she could not distribute literature on company property;[6] and telling William Lawhorn and other employees that Lawhorn would be fired if the Union lost the election.[7]

We reverse the judge's findings that the Respondent violated Section 8(a)(1) by the actions described below. Accordingly, we dismiss the complaint allegations relevant to those actions.

A. Signs Indicating Video Surveillance and No Trespassing[8]

Contrary to the judge, we find that the Respondent did not violate Section 8(a)(1) by erecting 10 "no trespassing" signs and 4 signs giving notice that all activities were being monitored by video camera. As more fully set forth in the judge's decision, included among the 14 signs posted on May 22 and 23 was one "no trespassing" sign at the entrance to the employee parking lot, near the area where the Union and employees began campaigning on May 21. The video surveillance had been in place for over a year when the Respondent posted the signs. Similarly, there is no evidence that trespassing was permitted prior to the posting of the signs. Employees passed the security guard desk and surveillance monitors on their way into work. The only change in May 2002 was the posting of the signs.

The judge found that the Respondent violated Section 8(a)(1) by posting these signs. We disagree. Under the circumstances, we find that signs acknowledging the existence of video surveillance, known to employees for a year, did not have a reasonable tendency to restrain, coerce, or interfere with employees' Section 7 rights. Similarly, there is no basis for concluding that employees would reasonably believe that the "no trespassing" signs, posted at the same time as the video surveillance signs, represented a change in policy concerning access to the Respondent's private property in response to the Union's campaign. Contrary to our colleague, we find, notwithstanding the timing of the sign placement, that the Respondent dispelled any erroneous assumption that the "no trespassing" signs were directed at union activity, by continuing to allow such activity. Accordingly, we reverse the judge and dismiss this complaint allegation.

B. Assignment of Work to Tammy Medina

We also reverse the judge's finding that the Respondent violated Section 8(a)(1) by allegedly assigning more onerous work to relief machine operator Tammy Medina because of her union activity. On August 11, Medina was assigned to relieve seven machine operators as part of her job duties. Medina claimed that she was typically assigned to relieve five or six machine operators. Manager Gary Birkemeyer testified that the Respondent's standard procedure is to assign seven machine operators to every relief operator. In light of Birkemeyer's uncontradicted testimony, there is no support for the judge's finding that the August 11 assignment was unusually onerous, even if Medina typically was assigned to relieve one or two fewer machine operators. Therefore, we reverse the judge and dismiss this complaint allegation.

C. Instruction to Patti Wickman and Cathy Hill to Remove Marker Messages from Their Arms

On August 13, employees Patti Wickman and Cathy Hill displayed prounion slogans, written in magic marker on their arms, while at work. Managers Birkemeyer and Dan Kear told them to wash off these messages. The Respondent maintains hygiene and cleanliness standards prohibiting, inter alia, temporary markings on employees' skin in the production area of the plant, based on safety concerns about food contamination.

The judge found that the Respondent's actions violated Section 8(a)(1), reasoning that the Respondent failed to demonstrate special circumstances for prohibiting union insignia because there is no evidence that Wickman and Hill came into contact with unpackaged food in the packaging department where they worked. We disagree. Although an employer may not lawfully prohibit employees from wearing union insignia unless it demonstrates special circumstances, the Board has recognized safety and product integrity as special circumstances.[9]

[6] Chairman Battista and Member Walsh adopt this finding. They find that the security guard's instruction to Hill, when viewed in the context of other contemporaneous unlawful actions restricting prounion employee activity on the Respondent's premises, cannot be viewed as an isolated or de minimis event. Member Schaumber would reverse the judge. He finds that the guard's erroneous instruction was an isolated incident that was not further enforced, and, therefore, any interference with employee rights was de minimis. Member Schaumber notes that Hill suffered no adverse consequences as a result of the guard's instruction, and her reaction (assertively rebuffing the security guard and telling her supervisor who asked what happened that the guard "was just being stupid") demonstrates that a reasonable employee would know that the instruction was in error and, consequently, would suffer no interference, restraint, or coercion of Sec. 7 rights. Finally, Chairman Battista and Member Schaumber find it unnecessary to pass on the judge's discussion of *Tri-County Medical Center*, 222 NLRB 1089 (1976), which is not implicated in resolving this issue.

[7] Member Schaumber finds it unnecessary to pass on the judge's finding. In his view, such a finding would be cumulative and would not materially affect the remedy for this unlawful conduct, in light of the finding that the Respondent violated Sec. 8(a)(1) by Supervisor Dennis Herod's suggestion to Thomas Thompson that the Respondent's president might move production lines out of the facility if the employees selected the Union.

[8] Member Walsh does not join in this section of the decision. See his partial dissent.

[9] See, e.g., *Kendall Co.*, 267 NLRB 963, 964–965 (1983) (lawful dress code prohibiting nonwork-related items such as pins and key chains that could be tangled in machinery or contaminate medical prod-

The Respondent's concern that ink from marker messages on employees' arms could contaminate food products provides support for its "special circumstances" argument. The fact that Wickman and Hill worked in the packaging department is irrelevant; the Respondent's rules prohibit potential food contaminants anywhere in the production area, which includes the packaging department. Therefore, we will not second-guess the Respondent's judgment that the marker messages presented a food safety issue, regardless of whether Wickman and Hill generally came into contact only with packaged food.[10] We reverse the judge and dismiss this complaint allegation.

D. Kelly Frey's Statement to Thomas Thompson[11]

On August 21, Supervisor Kelly Frey gave employee Thomas Thompson a verbal warning for not being at his workstation on time.[12] Thompson argued with Frey, and Frey mentioned Thompson's absence several days earlier. Thompson said he overslept, and the two argued about whether Thompson was required to call in. Frey then told Thompson not to play games, stating that his Union was not around to protect him now.

The judge found that this statement violated Section 8(a)(1), in effect threatening Thompson with stricter enforcement of the Respondent's disciplinary rules. We disagree. The entire context of the conversation gives a simpler meaning to Frey's comments: that she believed Thompson thought the Union's presence protected him from the usual disciplinary sanctions for infractions of the Respondent's established personnel policies and wanted him to know that he enjoyed no such immunity. Moreover, Frey's comment was prompted by Thompson's arguing with her about lawful warnings for legitimate disciplinary infractions. We find this context more revealing than the earlier unfair labor practices that our colleague cites. Therefore, we reverse the judge and dismiss this complaint allegation.

ucts manufactured by the company: "While employees have the right to wear union insignia at work, employers have the right to take reasonable steps to ensure full and safe production of their product. . . .").

[10] Moreover, the evidence does not support the judge's finding that the rule was instituted just prior to the election, and there is no evidence of discriminatory enforcement (the Respondent prohibited antiunion employees from wearing stickers, flashing hand-held cards on the production line, and posting signs behind food production machines). The judge's mention of shirts with sports-team logos is irrelevant, as such an item does not present the food safety hazard that justifies the Respondent's prohibition of temporary markings on employees' skin in the production area.

[11] For the reasons set forth in his partial dissent, Member Walsh does not join in this section of the decision.

[12] There is no contention that the warning was unlawful.

II. 8(a)(3) ALLEGATIONS

We adopt the judge's findings that the Respondent violated Section 8(a)(3) by terminating employees William Lawhorn[13] and Russell Teegardin.[14] We also adopt the judge's finding that the Respondent violated Section 8(a)(3) by its June 22 and June 26 warnings to Teegardin.[15] We adopt the judge's finding that the Respondent violated Section 8(a)(3) by denying Cheri Todd the fill-in lead position because of her union activity, as well as Section 8(a)(1) by Manager Kear's statement to that effect.[16] However, we reverse the judge and find that the Respondent did not violate Section 8(a)(3) by terminating employees John Green, Gary Hill, Thomas Thompson, Tyrone Holly, and Patti Wickman.[17] We dismiss these allegations for the reasons discussed below.

[13] In adopting this finding, Member Schaumber finds it unnecessary to rely on the judge's findings regarding Supervisor Betty Gerren's August 10 statement that Lawhorn would be fired if the Union lost the election. As noted above, Member Schaumber finds it unnecessary to pass on whether that statement violated Sec. 8(a)(1).

[14] In adopting this finding, we note that some of the judge's disparate treatment analysis is not directly on point. The judge's examples of many employees who engaged in egregious and repeated sexual harassment show that the Respondent does not consistently enforce its policy against harassment. Nonetheless, because the Respondent did not immediately discharge Teegardin based on his exchange with Don Whitted, but, rather, terminated him for falsification of his employment application in addition to sexual harassment, Teegardin is not similarly situated to those employees. More analogously, the Respondent continued to employ Marvin Hinton after he received multiple disciplinary actions, including incidents involving sexual harassment and falsification of his lab report, respectively. Hinton was also hired despite the Respondent's discovery of his two criminal convictions 2 days after he had answered "no" to the employment application question about prior convictions (the same question Teegardin answered). Thus, the fact that both Teegardin and Hinton were accused of sexual harassment and falsification of documents makes them similarly situated; however, Hinton was not terminated until he was involved in a subsequent altercation with an employee on the production line. We find that the Respondent's disparate treatment of Hinton, as well as its conduct in responding to Whitted's August 8 complaint about Teegardin while failing to investigate Teegardin's August 7 complaint about Whitted, are the most compelling examples of disparate treatment.

[15] However, regarding the June 22 warning, we find it unnecessary to rely on the judge's finding that no rank-and-file employees complained that Teegardin was harassing them, based on Manager Al Wilson's inability to recall the names of two employees who complained to him about Teegardin. We find that, even assuming that these unidentified employees complained about Teegardin's organizing activities, no evidence suggests that Teegardin's union advocacy involved unprotected conduct.

[16] We note that the Respondent has the opportunity at the compliance stage of this proceeding to submit evidence in support of any potential limitations on the remedy for this violation due to the asserted temporary nature of the fill-in lead position.

[17] The dissent criticizes our analysis, contending that we should view these terminations as part of an unlawful pattern rather than looking at each employee's discharge in isolation. However, we find that nothing in the General Counsel's evidence of antiunion animus relieves the Board of its obligation to engage in a *Wright Line*, 251 NLRB 1083

A. John Green[18]

Following consecutive periods of medical leave and restricted work due to a knee and shoulder injury, John Green returned to work without restrictions on September 6. He asked his leadperson, Holly Gerdeman, to assign him to a different machine so that he would not have to climb under as much equipment. Gerdeman denied the request, informing Green that she needed an experienced operator to operate the machine. Shortly thereafter, Green asked Gerdeman if he could go home. Gerdeman found a replacement for Green and allowed him to leave early. Green called the Respondent's security office on September 9, his next scheduled workday, and informed them that he was not coming to work. He did not call in or report to work on September 10 or 11. On September 11, Green took a doctor's note that read "seated work only until MRI of knee," to the Respondent's human resources office and gave it to an employee identified as "Maureen." On September 13, Green's doctor faxed Green's MRI results, which showed a knee injury, to the Respondent. Green did not report to work or call in at any time thereafter; he had no further contact with the Respondent, and the Respondent did not contact Green to tell him whether work was available with his restrictions. Pursuant to its policy, the Respondent terminated Green on September 18 for failing to report or call in to work for 3 consecutive days.

The judge found that the Respondent violated Section 8(a)(3) by terminating Green. He based his finding on the Respondent's departure from its normal procedure for handling medical restrictions slips (calling employees to tell them whether restricted work was available), as well as disparate treatment compared with Kim Combs-Mason, an openly antiunion employee who was given a verbal warning for failing to report or call in to work for 3 successive workdays. We disagree. Even assuming that the General Counsel has met his initial burden under *Wright Line*,[19] we find that the Respondent has demonstrated that it would have terminated Green even in the absence of his protected activity.[20]

Green's failure to report to work or call in for well beyond 3 successive workdays is more than sufficient to warrant termination under the Respondent's policy. Notwithstanding the fact that the record does not clearly delineate where Green's responsibility ends and where the Respondent's obligation to call him about available work begins, the General Counsel has not proven that Green did everything that was required of him and was merely awaiting a response about restricted work from the Respondent. In the absence of a total restriction from working or an approved medical leave, Green's failure to report to work or follow up with the Respondent in any manner to inquire about his work status was not reasonable. Contrary to our colleague, we find that these circumstances are relevant to the inquiry into whether the Respondent would have discharged Green absent his union activity. We are mindful of the Respondent's other unfair labor practices; nonetheless, such acts do not preclude us from finding that the Respondent had a legitimate motive for discharging other employees, such as Green. Moreover, even assuming that the Respondent did not fully comply with its work restriction procedures, such a finding would not establish that antiunion animus was the reason for its mistake or that Green's conduct was excusable. Contrary to the judge's finding, Combs-Mason was not similarly situated with Green because her absence was arguably protected by the Family and Medical Leave Act; therefore, the General Counsel has not established disparate treatment. In sum, the Respondent has provided a legitimate reason on which it relied for terminating Green, thus sustaining its burden under *Wright Line* and rebutting any evidence of discriminatory motive. Accordingly, we reverse the judge and dismiss this complaint allegation.

B. Gary Hill and Thomas Thompson[21]

In September, the Respondent began using a palletizer, which automates the stacking of product and keeping track of inventory. Employees Gary Hill and Thomas Thompson, union supporters who continued to leaflet monthly on behalf of the Union after the election, were among those who applied for the job of palletizer operator. The Respondent selected and trained them to work as first-shift palletizer operators, even though it knew of

(1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), analysis for each alleged violation of Sec. 8(a)(3). Accordingly, we separately discuss each discharge in turn, while keeping in mind the totality of the circumstances involved in this organizing campaign.

[18] Member Walsh does not join in this section of the decision. See his partial dissent.

[19] To prove a violation of Sec. 8(a)(3) under *Wright Line*, the General Counsel must first show discriminatory motive, by a preponderance of evidence, by offering evidence that the employer was aware of the employees' protected activity and that animus against that activity motivated the employer's alleged discrimination. The burden then shifts to the employer to demonstrate that the same action would have occurred even in the absence of protected conduct. See, e.g., *KFMB Stations*, 343 NLRB No. 83, slip op. at 4 (2004).

[20] Although Chairman Battista agrees that the Respondent met its rebuttal burden, he would find that the General Counsel failed to meet his initial *Wright Line* burden because there is insufficient proof that the officials involved in the Respondent's decision to discharge Green had knowledge of his very limited union activities.

[21] Member Walsh does not join in this section of the decision. See his partial dissent.

their prounion status. In early November, the Respondent gave Hill, Thompson, and another palletizer operator written warnings for failing to follow Warehouse Manager Rick Quinn's specific instruction to shut off the infeed conveyor to the palletizer in the event of a recurring computer problem. There are no exceptions to the judge's finding that these warnings for failing to follow a supervisor's directions were not motivated by any animus against the continuing union activities of Hill and Thompson.

The palletizer ran continuously. Consequently, operators for a succeeding shift were scheduled to arrive a half hour prior to the end of the preceding shift. On December 26, second-shift palletizer operator Victoria Truesdale had not arrived for her 1:30 start time. Hill notified Supervisor Kelly Frey by telephone that he would have to shut down the palletizer in order to leave at 2 (the end of his and Thompson's shift) for a scheduled appointment. Frey told Hill that both he and Thompson had to stay and run the palletizer. She declined Hill's request to find Thompson a ride home if he stayed past the end of his shift.

Although Frey told Hill that he and Thompson would be reprimanded if they left, Hill and Thompson shut down the palletizer and clocked out at the end of their shift. Truesdale arrived and began running the palletizer shortly after Hill and Thompson left. On January 3, the Respondent terminated Hill for insubordination and leaving work without permission, and it terminated Thompson for receiving three written warnings in a 12-month period, including a warning for leaving work without permission on December 26.

The judge found that the terminations violated Section 8(a)(3). He rejected the asserted reasons for discharge as pretextual. We disagree. Clearly, each employee engaged in the conduct of which he was accused.[22] While the Respondent's employee handbook gave Hill a seniority-based right to leave at shift's end if Thompson stayed, there is no evidence that the Respondent would tolerate Hill's disruption of production by shutting down the palletizer and leaving when he knew that Thompson would not stay. Thompson, of course, cannot rely on any putative handbook right to justify his departure.

Little more than a month earlier, both employees were lawfully disciplined for failing to follow Warehouse Manager Quinn's directions about palletizer operations. Immediately before they shut down the palletizer and left work on December 26, Frey warned Hill and Thompson that they would be reprimanded if they both left.[23] The Respondent's established disciplinary policies clearly permit termination for their offenses.[24] Again, contrary to the dissent, we examine these relevant circumstances as part of our determination that the Respondent would have terminated Hill and Thompson even in the absence of their protected activity.

In sum, we do not agree with the judge's conclusion that an employer without a discriminatory motive would not have terminated Hill and Thompson. We find that the Respondent met its burden under *Wright Line* by demonstrating that it would have terminated Hill and Thompson for legitimate reasons even in the absence of their protected activity**.** Therefore, we reverse the judge and dismiss these complaint allegations.

C. Tyrone Holly[25]

On January 18, 2003, Tyrone Holly wore a shirt with buttons to work as a relief machine operator. The Respondent had decided to phase out the use of button shirts, replacing them with snap shirts after a consumer choked on a button that had fallen into one of the Respondent's products. Holly had been issued snap shirts but wore the button shirt on this occasion because he claimed that his snap shirts were dirty. When Supervisor Diane Tate first saw Holly wearing the button shirt, she told him that he could not wear it. Holly responded by asking if he could go home. Tate said no because she needed him to relieve the other machine operators. Later that morning, Tate saw Holly again wearing the button shirt, and she obtained a used snap shirt, which she gave Holly to wear. When she next saw him, wearing the short-sleeved snap shirt over the long-sleeved button shirt (which left the buttons on the sleeves exposed), Tate

[22] Contrary to the judge, we find the Respondent's distinction between Hill's conduct in refusing a direct order and Thompson's conduct in failing to respond to an indirect request to remain at work to be a reasonable explanation for the differences in the Respondent's stated reasons for terminating Hill and Thompson.

[23] Contrary to the judge, we do not find that Frey's failure specifically to mention discharge suggests that she meant only lesser discipline would result. We further note that when Frey gave Thompson his first warning on August 21, she sought to disabuse him of the notion that his status as a union supporter provided him any special protection from customary discipline for infractions of the Respondent's established personnel policies.

[24] The judge, in support of his disparate treatment analysis, cited several examples of employees who received lesser discipline for insubordination or receiving three warnings within a year. In contrast to this evidence, the Respondent cited several examples of employees who, like Hill and Thompson, were terminated for insubordination or receiving three warnings within a year. Although the Respondent may not have acted with perfect consistency through the years, the General Counsel has not shown a disparity along Sec. 7 lines. Unlike our colleague, we find this evidence too equivocal to support the General Counsel's assertion of disparate treatment and his corresponding argument that the Respondent's reasons for terminating Hill and Thompson are pretextual.

[25] For the reasons set forth in his partial dissent, Member Walsh does not join in this section of the decision.

told Holly for a third time to change his shirt. As Holly was on his way to change, Tate paged him on the intercom to remind him of the importance of changing his shirt. The fourth time that Tate saw Holly, he was wearing a long-sleeved snap shirt that he had obtained from the uniform shop, in compliance with the Respondent's policy. Tate memorialized her warnings to Holly in writing. She gave these to Manager Birkemeyer, who, along with Plant Manager Dennis Babb and Human Resources Manager Jack Johnson, decided to terminate Holly for insubordination.

The judge found that the Respondent violated Section 8(a)(3) by terminating Holly, citing the Respondent's failure to talk to Holly before terminating him,[26] and its disparate treatment of other employees who received discipline less severe than termination for acts of insubordination. The judge stated, "Holly was clearly not insubordinate. He may have been slow to comply with Tate's directions but he never defied her." We disagree. We will not substitute our own judgment for the Respondent's, as the judge did by imposing his own subjective standard of insubordination. Rather, we find that the Respondent met its *Wright Line* burden by demonstrating that its decision to terminate Holly for insubordination based on his repeated failure to comply with a supervisor's direct order was legitimate and would have occurred even in the absence of Holly's protected activity. Notwithstanding the few examples of employees who committed multiple acts of insubordination being treated somewhat less harshly than Holly, we will not second-guess the Respondent's judgment on such a significant safety issue as preventing choking hazards. As we noted in our discussion of Hill and Thompson's discharges, the contrary evidence of employees who were terminated for insubordination diminishes the significance of this evidence. Furthermore, the timing of Holly's termination, 5 months after he last engaged in protected activity, does not support an inference of unlawful motive. For these reasons, we reverse the judge and dismiss this complaint allegation.

[26] The judge relied on similar reasoning regarding the extent of the Respondent's investigation and failure to question alleged discriminatees in discussing several of the 8(a)(3) allegations. In Chairman Battista and Member Schaumber's view, the judge overemphasized such factors, in effect imposing a standard akin to due process on the Respondent. They note that an employer's failure to question an alleged wrongdoer or a witness to an alleged incident may be one factor in assessing the employer's motivation, particularly where that failure is contrary to past practices. It does not invariably indicate unlawful motivation and is only one of many circumstances that should be examined.

D. Patti Wickman[27]

During the night shift on January 19–20, 2003, Patti Wickman's leadperson, Theresa Shartzer, asked her if she had called three Hispanic employees who were working nearby "fucking bitches." Wickman denied doing so, and she again denied making the comment when she was called to Shift Manager Kear's office to discuss the accusation. Kear reminded Wickman during her disciplinary interview that she had been warned about this type of conduct before (the record contains several examples of Wickman screaming and cursing at employees and managers while working, including an incident for which she was suspended). Kear's investigation also included interviewing the three employees who accused Wickman. Employee Bertha Noriega acted as interpreter in this interview due to the employees' lack of fluency in English.

Kear initially suspended Wickman. In his memo to human resources personnel, he recommended termination, which "would not only send a strong message in regards [sic] to respect and dignity but would also show support for our staffing agencies and the Spanish speaking community." Kear also noted in the memo that the incidents were "ongoing in nature." Human Resources Director Jack Johnson subsequently informed Wickman that she was terminated.

The judge found that the Respondent violated Section 8(a)(3) by terminating Wickman. We disagree. Assuming, arguendo, that the General Counsel met his initial burden under *Wright Line*, supra, the Respondent proved that it would have terminated Wickman even in the absence of her protected activity. In particular, we disagree with the judge's conclusion that the Respondent did not reasonably believe that the incident occurred. He discounted the testimony of the Respondent's managers as hearsay based on the communication problems between Wickman's accusers and the managers. However, we do not agree that this testimony is hearsay merely because of the Spanish-English language barrier. Kear testified about the result of his investigation, which persuaded him to recommend termination. The fact that an interpreter assisted in Kear's direct interviews of the accusers does not render his testimony concerning the investigation hearsay. Moreover, Wickman's prior outbursts provided the Respondent with additional context to the investigation. For these reasons, we conclude that the Respondent had a reasonable belief that Wickman engaged in the conduct of which she was accused.

Additionally, the evidence supports another concern that arose in the course of the Respondent's decision to

[27] Member Walsh does not join in this section of the decision. See his partial dissent.

terminate Wickman: maintaining peaceful relations among employees with differing ethnic origins. Although Wickman's alleged comment was not an ethnic slur on its face, the evidence reveals some animosity between Wickman and Spanish-speaking employees that the Respondent could have reasonably feared to have been exacerbated by this incident. Wickman admitted during her exit interview and at the hearing that she had an acrimonious relationship with the Respondent's Spanish-speaking employees. Indeed, Kear's memo to human resources documented the need to send a message of respect and dignity and to show support for the Respondent's Spanish-speaking employees. Such concerns do not implicate any antiunion motive against Wickman.

Finally, unlike our colleague, we are not persuaded by the General Counsel's disparate treatment argument. Wickman had been disciplined many times for screaming and cursing at fellow employees and managers, yet she persisted in similar transgressions. Even assuming that the Respondent did not precisely follow its progressive discipline policy when it terminated Wickman, we find that this does not prove that protected activity, rather than Wickman's history of inappropriate behavior, motivated her discharge. For these reasons, we find that the Respondent proved that it would have terminated Wickman pursuant to a lawful motive in any event, and we reverse the judge and dismiss this complaint allegation.

ORDER

The Respondent, Consolidated Biscuit Company, McComb, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining, discharging, or otherwise discriminating against employees for engaging in union or other protected activities;

(b) Threatening employees with adverse consequences if they select a union as their bargaining representative;

(c) Suggesting to employees that selecting a union as their bargaining representative would be futile;

(d) Prohibiting or inhibiting the discussion of matters relating to the selection of a union while permitting the discussion of other nonwork-related subjects;

(e) Prohibiting or interfering with the display of support for the Union, verbal dissemination of opinion supporting the Union and/or the distribution of union literature on the exterior of the plant, including company property;

(f) Instructing its agent to call the police to interrupt lawful union activity and calling the police to its facility to interfere with employees engaged in lawful activities in support of the Union;

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer William Lawhorn and Russell Teegardin full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make William Lawhorn and Russell Teegardin whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of William Lawhorn and Russell Teegardin, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Within 14 days from the date of this Order, offer Cheri Todd the position of fill-in lead and make Cheri Todd whole for any loss of earnings or other benefits suffered as a result of the discrimination against her.

(e) Within 14 days from the date of this Order, remove from its files any references to the unlawful disciplinary warnings issued to: Russell Teegardin on June 22, 2002 and on June 26, 2002; Gary Hill on June 27, 2002; and Thomas Thompson on June 27, 2002; and within 3 days thereafter notify each employee in writing that this has been done and that the discipline will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its McComb, Ohio plant copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representa-

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tive, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 21, 2002.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election held in Case 8–RC–16402 is set aside and Case 8–RC–16402 is severed from Cases 8–CA–33402, et al., and remanded to the Regional Director for Region 8 for the purpose of conducting a new election.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed, and employees engaged in an economic strike that began more than 12 months before the date of the election directed and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, AFL–CIO, CLC.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election shall have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. April 28, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

The majority finds, and I agree, that the Respondent engaged in numerous violations of Section 8(a)(1) and (3) of the Act, including the unlawful discharges of the two most active union supporters, Russell Teegardin and William Lawhorn.[1] Despite these findings, which demonstrate the Respondent's strong union animus and its willingness to discharge employees and commit other

[1] In addition to the unlawful termination of Teegardin and Lawhorn, the majority finds that the Respondent unlawfully issued disciplinary warnings to Teegardin, Thomas Thompson, and Gary Hill, denied employee Cheri Todd a temporary lead position and told her she was not selected because of her union activity, told employees not to talk about the Union on company time, suggested to employees that supporting the Union would be futile, instructed security guards to call police at the first sign of union activity and called the police, threatened employees with loss of benefits, plant closure, and stricter discipline if they supported the Union, told an employee that she could not distribute literature on company property, and told employees that Lawhorn would be fired if the Union lost the election. I agree with these findings.

unfair labor practices in order to thwart the union's ability to organize and maintain support, the majority refuses to draw the inference that the Respondent also unlawfully discharged union supporters John Green, Gary Hill, Thomas Thompson, Tyrone Holly, and Patti Wickman because of their union activities. Rather than viewing these discharges as part of an unlawful pattern, the majority looks at each discharge in isolation and finds that the Respondent has shown that it would have discharged each of these employees even in the absence of their union activities. I find, however, that these discharges were part of a strategy whereby the Respondent seized upon infractions committed by suspected union supporters in order to rid itself of them and prevent the resurgence of the union campaign. I conclude, contrary to the majority, that the Respondent failed to meet its burden of showing that it would have taken the same action against those employees in the absence of their union activities. Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) by discharging Green, Hill, Thompson, Holly, and Wickman.[2] I also find two additional violations of Section 8(a)(1).[3]

I. JOHN GREEN

I would adopt the judge's finding that Green's discharge violated Section 8(a)(3) and (1) of the Act. The majority finds that Green was discharged because he did not report to work or call in after providing the Respondent a doctor's note and test results showing that Green had a knee injury. The majority is willing to assume that the General Counsel met its initial *Wright Line*[4] burden, but finds that the Respondent met its burden of showing that it would have discharged Green in the absence of his union activity. Despite finding that the "record does not clearly delineate where Green's responsibility ends and where the Respondent's obligation to call him about available work begins," the majority finds that Green's failure to report to work or follow up about his work status was unreasonable and warranted termination. In so finding, the majority relies on the failure of the General Counsel to prove that "Green did everything that was required of him."

Contrary to the majority, I find that the Respondent has not met its *Wright Line* burden. The relevant inquiry is not whether Green was justified in failing to follow up with the Respondent concerning his medical status or whether Green could have legitimately been discharged for his failure to call in. Rather, the appropriate question is whether the Respondent would have discharged Green for failing to report or call in if he had not engaged in union activity. I find that in light of all the other unlawful activity engaged in by the Respondent, including the unlawful discharge of other active union supporters[5] and the Respondent's stated intention to watch employees more closely and get tougher on them if the Union came in,[6] the Respondent has not met its burden of showing that it would have discharged Green under these circumstances in the absence of his union activity. Rather, the totality of the circumstances leads me to conclude that the Respondent seized upon Green's failure to report or call in concerning his medical status as an opportunity to get rid of another union supporter and that it would not have taken the same action in the absence of Green's union activity. Accordingly, I would adopt the judge's finding that Green's discharge violated Section 8(a)(3) and (1).

II. GARY HILL AND THOMAS THOMPSON

I would adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging Hill and Thompson. The majority finds that the Respondent met its *Wright Line* burden of showing that it would have discharged Hill and Thompson for legitimate reasons in the absence of their union activity, finding that the Respondent's disciplinary policies "permit termination for their offenses."[7] I find, however, as with Green's discharge discussed above, that the relevant inquiry is not whether the Respondent may have been entitled to discharge Hill and Thompson for their offenses, but rather whether the Respondent has met its burden of showing that it would have taken that action absent their union activities. I conclude, as I did with Green, that the Respondent failed to meet its burden. While the Respondent cited examples of other employees who were termi-

[2] The majority claims that in evaluating each discharge it is "keeping in mind the totality of the circumstances." The majority fails, however, to appreciate the significance of those circumstances, which lead to the conclusion that these employees were discharged pursuant to a strategy of hampering the Union's ability to organize by the elimination of perceived union supporters.

[3] I agree with the majority in all other respects, except where otherwise noted.

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[5] An employer's "unlawful disciplinary action against one prounion employee based on antiunion animus helps to support the inference that the same animus motivated its actions against other prounion employees." *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

[6] Supervisor Gerren unlawfully warned three employees on June 7, 2002, that employees had better watch what they were doing because the Respondent was "going to get tougher on you." Gerren told employees that "if you get a union in here, they'll be watching you." This warning reveals the Respondent's intention to rid itself of union supporters by watching them more closely and relying on alleged misconduct to justify their discharges.

[7] Contrary to a supervisor's instructions, Hill and Thompson shut down and left the palletizer at the end of their shift, before being relieved by the next shift.

nated for insubordination or for receiving three warnings within a year, the record also contained examples of other employees who engaged in similar misconduct and who were not discharged. The majority concedes that the Respondent "may not have acted with perfect consistency through the years," but concludes that the General Counsel has not shown a "disparity along Section 7 lines." I find, however, that the absence of a consistent pattern of discipline supports my conclusion that the Respondent failed to meet its burden of showing that it would have discharged Hill and Thompson for this incident in the absence of their union activities. That conclusion is bolstered by the Respondent's demonstrated willingness to unlawfully discharge union supporters such as Lawhorn and Teegardin for engaging in union activity and its stated intention to watch employees more closely and get tougher on them if the Union came in. As I concluded with Green, the Respondent seized upon this incident as an excuse to get rid of additional union supporters, and I am not convinced that it would have taken the same action in the absence of their union activity. Accordingly, I agree with the judge that these discharges violated Section 8(a)(3) and (1).

III. TYRONE HOLLY

Contrary to the majority, I find that the Respondent has not met its burden of showing that it would have discharged Holly for insubordination absent his union activities.[8] The majority acknowledges that the General Counsel presented evidence that other employees who engaged in multiple acts of insubordination were not discharged, but they nevertheless find the termination lawful because Holly's conduct involved a safety issue. As with the discharges of Hill and Thompson, the Respondent has not demonstrated a consistent pattern of discipline concerning multiple refusals to follow a supervisor's direct order. In light of that inconsistency, I find that the Respondent has not met its burden of showing that it would have discharged Holly for that conduct if he had not been a union supporter. Although the majority finds that Holly's conduct warranted discharge because of the "choking hazard," I am not convinced, in light of the Respondent's willingness to unlawfully discharge union supporters and its stated intention to get tougher on employees if the Union came in, that Holly would have been discharged for this conduct if he had not engaged in union activity. As with Green, Hill, and Thompson, I find that the Respondent seized upon Holly's misconduct as an opportunity to get rid of another union supporter. Accordingly, I agree with the judge that Holly's discharge violated Section 8(a)(3) and (1).

[8] Holly repeatedly failed to change his button shirt to a snap shirt as instructed by a supervisor.

IV. PATTI WICKMAN

I agree with the judge that the Respondent violated Section 8(a)(3) and (1) by discharging Patti Wickman. In dismissing this allegation, the majority finds that the Respondent had a reasonable belief that Wickman called Hispanic employees "fucking bitches" and that, therefore, the Respondent would have discharged Wickman even absent her union activities. The judge, however, found no reliable evidence that Wickman had engaged in the conduct of which she was accused, that the Respondent "may not even have reasonably believed" that Wickman had engaged in the conduct, and that even if the Respondent had a reasonable belief that she had done so, the Respondent had not shown that she would have been discharged because of that conduct. In so concluding, the judge found that the Respondent had failed to follow its progressive discipline policy, and engaged in disparate treatment in discharging Wickman. Even assuming, as the majority finds, that the Respondent had a reasonable belief that Wickman had called the employees "fucking bitches," I agree with the judge, in light of the Respondent's failure to follow its progressive disciplinary policy, its disparate treatment, its demonstrated desire to rid itself of perceived union supporters, and its stated intention of getting tougher on employees if the Union came in, that the Respondent has not met its burden of showing that it would have discharged her for that conduct in the absence of her union activity. Rather, this discharge was another step in the execution of the Respondent's plan to seize upon alleged misconduct by employees as an opportunity to get rid of perceived union adherents and dilute the Union's support. Accordingly, I would find that Wickman's discharge violated 8(a)(3) and (1).

V. VIDEO SURVEILLANCE AND NO-TRESPASSING SIGNS

I agree with the judge that the Respondent violated Section 8(a)(1) by erecting no-trespassing signs near the entrance to the employee parking area where the employees had begun to congregate 1–2 days before. The timing of the placement of the signs is highly suspicious, and would cause employees to reasonably believe that the signs were directed at their union activity. Although the signs had been ordered before the employees began their open organizing efforts, the employees were unaware of that fact. Under these circumstances, I agree with the judge that the placement of the signs immediately following the commencement of public organizing would reasonably tend to discourage employees from congregating. The majority contends that because the

Respondent continued to allow union activity, "any erroneous assumption" that the signs were directed at union activity would be dispelled. The fact that the Respondent did not immediately act to stop union activity at that location does not preclude the employees from reasonably being discouraged by the signs from continuing their union activity there. Because of the timing of the placement of the signs, the employees had no way of knowing that union activity was not intended to be proscribed. Employees should not have to guess at the meaning of the signs, and should not have to risk possible discipline in order to determine whether or not the signs were directed at union activity. In light of the ambiguity caused by the timing of the sign placement, a reasonable employee would be coerced in his willingness to congregate at that location and participate in union activity there.

The majority also contends that the signs were not coercive because the area was already under video surveillance. The fact that the area was already under video surveillance is insufficient to mitigate the coercive nature of the no-trespassing signs. For these reasons, I find that the placement of the signs would reasonably tend to restrain, coerce, and interfere with the exercise of the employees' Section 7 rights and therefore violated Section 8(a)(1) of the Act.

VI. THOMPSON THREAT

I agree with the judge that the Respondent violated Section 8(a)(1) when Supervisor Kelly Frey told Thompson, in the context of a verbal warning for not being at his workstation on time, that his Union was not around to protect him now. The judge concluded that this statement was in effect an unlawful threat of stricter enforcement of disciplinary rules, and found this to be particularly coercive because the two most active union supporters, Teegardin and Lawhorn, had been discharged in the same timeframe. I agree with the judge. This incident occurred within a week of the discharges of Teegardin and Lawhorn, and less than 3 months after Gerren's unlawful warning that if the Union came in, employees would be watched more closely and the Respondent would be tougher on employees. I find that in this context, a statement to Thompson that his Union was not around to protect him anymore would reasonably be perceived as a threat of possible retaliation for engaging in union activities.[9] The fact that Frey's comment may have been prompted by an argument about whether Thompson was required to call in does not, as contended by the majority, diminish the coerciveness of the comment. Accordingly, I agree with the judge that this comment violated Section 8(a)(1).

Dated, Washington, D.C. April 28, 2006

Dennis P. Walsh, Member

[9] The reasonableness of this interpretation became evident later when Thompson was discharged for the palletizer incident discussed above. I also observe that at the time Frey's comment was made, Thompson had already received an unlawful warning 2 months before for allegedly "harassing" employees while engaging in union solicitation.

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discipline, discharge, or otherwise discriminate against any of you for supporting the Bakery, Confectionary, Tobacco Workers and Grain Millers International Union (BCTGM) or any other union.

WE WILL NOT threaten you with adverse consequences if you select the BCTGM or any other union as your collective-bargaining representative.

WE WILL NOT suggest to you that selecting the BCTGM or any other union as your bargaining representative would be futile.

WE WILL NOT prohibit or restrain you from discussing matters related to whether or not you wish to select a union as your bargaining representative while permitting the discussion of other nonwork-related subjects.

WE WILL NOT prohibit or interfere with your display of support for the BCTGM or any other union, verbal dissemination of opinion supporting the Union and/or your distribution of union literature on the exterior of our facility, including company property.

WE WILL NOT instruct our agent to call the police to interrupt lawful union activity or call the police to our facility to interfere with employees engaged in lawful activities in support of the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer William Lawhorn and Russell Teegardin full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make William Lawhorn and Russell Teegardin whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of William Lawhorn and Russell Teegardin, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline issued to: Russell Teegardin on June 22, 2002 and June 26, 2002; Gary Hill on June 27, 2002; and Thomas Thompson on June 27, 2002; and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Cheri Todd the position of fill-in lead, and WE WILL make her whole for any loss of earnings and other benefits resulting from our unlawful actions, less any net interim earnings, plus interest.

CONSOLIDATED BISCUIT CO.

Nancy Recko and *Iva Choe, Esqs.*, for the General Counsel.
Katharine T. Talbott and *Patrick J. Johnson, Esqs. (Eastman & Smith Ltd.)*, of Toledo, Ohio, for the Respondent.
William I. Fadel, Esq. (Wuliger, Fadel & Beyer), of Cleveland, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Bowling Green, Ohio, on July 29–August 1, 2003; September 8–11 and 29–30, 2003. It arises from the Bakery, Confectionary, Tobacco Workers and Grain Millers Union's (BCTGM or the Union) organizing drive amongst Respondent Consolidated Biscuit Company's (CBC) employees at its McComb, Ohio facility. Union supporters began demonstrating in front of the CBC facility on May 21, 2002, and the Union filed a representation petition with the National Labor Relations Board (the Board) on May 30, 2002. The campaign culminated in a representation election conducted on August 15, 2002. In that election 286 employees cast ballots in favor of representation by the BCTGM and 485 voted against representation by the Union.

The Union filed unfair labor practice charges and amended charges between May 24, 2002, and April 25, 2003; it also filed objections to conduct affecting the results of the election. The General Counsel issued a consolidated complaint on February 26, 2003. The hearing on the Charging Party's objections was consolidated with the hearing on the unfair labor practice charges on April 9, 2003. An amended consolidated complaint was issued on April 30, 2003.[1]

The General Counsel alleges that CBC committed a number of 8(a)(1) violations prior to the election. He also alleges that CBC violated Section 8(a)(3) and (1) in disciplining and/or discharging seven employees who openly supported the Union. Two of these allegations concern written warnings issued prior to the election to two of the most prominent supporters of the Union, Russell Teegardin and William Lawhorn. The General Counsel also alleges that CBC violated Section 8(a)(3) and (1) in issuing written warnings to union supporters Gary Hill and Thomas Thompson on November 5, 2002.

The other 8(a)(3) allegations concern the discharges of the seven following the election. Lawhorn was fired on August 16, 2002, the day after the election; Teegardin was fired a week and a half later. John Green was terminated on September 18, 2002. Gary Hill and Thomas Thompson were terminated on January 3, 2003. Tyrone Holly was fired on January 20, 2003, and the next day, CBC fired Patti Wickman.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, CBC, manufactures cookies, crackers, and other baked goods at its facility in McComb in northwestern Ohio.[3] It annually sells and ships goods valued in excess of $50,000 directly to points outside the State of Ohio. CBC admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, the BCTGM, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Each of the alleged violations must be analyzed independently; however, the context in which they occurred must also be considered. Related unfair labor practices are highly relevant in determining both the credibility of witnesses and Respon-

[1] This consolidated complaint inadvertently omitted the docket number for the hearing on the objections.

[2] Many of the exhibits are large documents, which have page numbers in the lower right hand corner such as CBC 00254 (the first p. of Jt. Exh. 2). I will refer to such pages by exhibit number and page number without the CBC and the zeros, e.g., Jt. Exh. 2, p. 254.

[3] CBC has a number of other facilities not involved in this case. Respondent often makes baked goods under contract with better known companies, such as Nabisco.

dent's motive with regard to a particular allegation. Unlawful discrimination against one prounion employee based on anti-union animus often supports an inference that the same animus motivated its actions against other prounion employees, *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). This is particularly true where, as in this case, Respondent's obvious discrimination against several of its prounion employees establishes hostility to unionization and employees' Section 7 rights—originating with CBC's president, James Appold, *NLRB v. DBM, Inc.*, 987 F.2d 540 (8th Cir. 1993); *Reeves Distribution Service*, 223 NLRB 995, 998 (1976).

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action. Once the General Counsel makes this initial showing, the burden of persuasion shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981); *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002).

The Board requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a "motivating factor" in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *American Gardens Management Co.*, 338 NLRB No. 76 (2002). Unlawful motivation is most often established by indirect or circumstantial evidence, such as the suspicious timing of disciplinary action, pretextual reasons given for the discipline and disparate treatment of the discriminatee(s) compared with employees without known union sympathies.

Other circumstances relevant to the instant case, which may also establish discriminatory motive, are an unprecedented investigation of an alleged discriminatee, the absence of a valid reason for conducting such an investigation, the failure of a respondent to provide the alleged discriminatee a sufficient opportunity to respond to allegations raised by an investigation, and a respondent's departure from its progressive discipline system and past practices, *Tubular Corp. of America*, 337 NLRB 99 (2001).

There is no question that CBC was aware of the union activities of each of seven discriminatees in this case when it took the alleged discriminatory actions against them. The only real issue is whether Respondent disciplined each of them for the nondiscriminatory reasons it proffers, and whether each of the seven would have been disciplined or discharged in the absence of Respondent's knowledge of their union activities and its hostility towards those who supported the Union.

Russell Teegardin

Russell Teegardin applied for work at Consolidated Biscuit Company as a maintenance mechanic on August 1, 2000. He was hired several days later and worked on the second shift until his termination on August 26, 2002.

Teegardin's personnel file (Jt. Exh. 2) indicates that CBC was satisfied with him as an employee prior to the advent of the BCTGM organizing drive. Respondent's personnel department generated a monthly employee review form in conjunction with a determination as to whether an employee merited a wage increase. At least between August 2000 and December 2001, Teegardin was granted a wage increase every month. Only once, on July 15, 2001, was he cautioned that his performance was not satisfactory with regard to absenteeism. On August 10, 2001, CBC issued Teegardin a written warning for excessive absenteeism. No other disciplinary measures were taken against him until June 2002.

In February 2002, Teegardin contacted the United Food and Commercial Workers about the possibility of organizing CBC's McComb facility. When this effort failed to materialize, he contacted the BCTGM. On March 28, 2002, Teegardin's immediate supervisor, Herb Telford,[4] saw Teegardin with union literature in the maintenance shop. Telford called his boss, Maintenance Manager Al Wilson, who was at home, and told him that he suspected that Teegardin was posting union literature on the company bulletin board in the maintenance shop. Wilson, who works first shift, drove to the plant where he, Telford, and second-shift production manager, Douglas Benjamin, summoned Teegardin to a meeting in Wilson's office. Wilson told Teegardin that he was not to place union literature on the company bulletin boards; Teegardin denied that he had done so.[5]

Teegardin solicited union authorization cards and on May 21, 2002, he, other employees, and union organizers began distributing union handbills across the street from the employee entrance to the CBC plant. The area in which the union handbillers stood was under constant surveillance and videotaping by security guards inside the plant and was visible to President James Appold from his office window. Teegardin distributed handbills in front of the plant on a regular basis until the August 15 election.

On June 5, 2002, Jack Johnson, Respondent's top human resources official, ran a criminal background check on Teegardin (Jt. Exh. 2, p. 290). At trial, Johnson was unable to offer a credible explanation as to why he made such an inquiry, which was unprecedented regarding an incumbent employee (Tr. 109).[6] Given the absence of any credible alternative explana-

[4] Telford's last name is transcribed as Talford at several places in the transcript.

[5] The testimony about this meeting relates to par. 7 of the complaint, which alleges that Respondent, through Herb Telford, made statements to Teegardin that violated Sec. 8(a)(1). I will dismiss that portion of the complaint because I cannot adequately resolve the conflicting testimony of Telford and Teegardin. However, this testimony establishes that CBC management was aware of Teegardin's active role in the organizing campaign as of March 28.

[6] Johnson testified that he might have conducted the search due to an anonymous tip, but could not testify as to who provided this information. I infer that Johnson was directed to conduct this search by a higher-level company official, most likely James Appold, CBC's president, who commissioned another criminal background inquiry on Teegardin 2 months later.

Johnson testified that two other employees had been terminated when Respondent discovered that they had omitted information about

tion, I find that this background check was motivated by CBC's hostility towards Teegardin's union activity. Johnson found no criminal record for Teegardin.

On June 22, CBC placed a memo in Teegardin's personal file signed by Maintenance Manager Al Wilson. The memo states that CBC had received several complaints about Teegardin harassing people about union support. Wilson stated that he asked Teegardin not to be "so forceful" when discussing the Union with people "and not to try to keep after them."[7]

Wilson testified that he received complaints from employees about Teegardin but he couldn't recall who they were. There is no credible evidence that any rank-and-file employee complained to management that Teegardin was harassing them about supporting the Union and no evidence at all about the nature of such complaints if they occurred—other than Teegardin was loud and that employees subjectively felt harassed. Based on the testimony of Plant Manager Dennis Babb, I find that Respondent warned Teegardin about harassing employees based on information it received from its supervisory personnel. There are no specifics in the record about the nature of the supervisors' complaints.

Teegardin's personnel file also contains a June 25, 2002 memorandum from packaging manager, Gary Birkemeyer, to second-shift production manager, Douglas Benjamin, and second-shift area manager, Donald Hager. The memo states that Teegardin "gets in peoples 'faces in the breakroom'" and screams or yells about the Union at various places in the plant. Birkemeyer testified his information came from Benjamin and Hager. Hager alleges that his information came from rank-and-file employees, but could not recall any names. Benjamin testified that he reported his conversations with Teegardin to Birkemeyer, his supervisor, in accordance with instructions to let higher management know about any union activity in the plant (Tr. 685–686).

Babb testified that he and Wilson met with Teegardin in July to tell him that they were continuing to get complaints that he was bothering people in the plant about organizing and joining the Union. He indicated to Teegardin that the complaining employees wished to be left alone. Babb told Teegardin to leave people alone that do not want to be approached by the Union and to confine his campaigning to the cafeteria and outside the building (Tr. 1866–1868). In fact the only complaints Babb had received were from Tony Wellington, the mixing department supervisor (Tr. 1870–1871). CBC relied on Wellington's complaints in discharging Teegardin in August 2002 (Tr. 1869).

In warning Teegardin about his "harassment" and telling him to leave people alone, Respondent restrained, coerced, and interfered with his Section 7 rights in violation of Section 8(a)(1) of the Act. Respondent did not have a valid nondiscriminatory rule that prohibited Teegardin from discussing the Union during worktime (see p. 39 herein). Moreover, even had CBC received complaints from rank-and-file employees, the fact that an employee may not want to hear a solicitation or repeated solicitations on behalf of the Union does not negate its protected status. This is so even if the employee subjectively considers such appeals to be "harassment," *Nichols County Health Care Center*, 331 NLRB 970, 981 (2000).[8]

An employer cannot restrict the exercise of Section 7 rights by merely characterizing an employee's activities as "harassment." Indeed, in this case, Respondent brought forth no evidence that its warning to Teegardin was prompted by anything he did that was not protected by the Act. While there were certainly many employees at the plant opposed to representation by the BCTGM, Teegardin was entitled to try to convince these employees to change their minds so long as his entreaties did not interfere with the performance of their job duties or cross the line into intimidation, coercion, or interference with the exercise of their Section 7 rights. There is no evidence that he did so.

The General Counsel did not allege a violation with regard to the June 22, 2002 warning. I find such a violation because the warning is closely connected to Teegardin's June 26 written warning and his subsequent discharge, which were alleged as violations in the complaint and are discussed below. It is well settled that the Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. This rule has particular force when, as in the instant case, the violation is established by the testimonial admissions of Respondent's own witnesses, *Letter Carriers Local 3825 (Postal Service)*, 333 NLRB 343 fn. 2 (2001); *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

Teegardin's June 26 Written Warning

Teegardin was involved in a verbal altercation with employee Kevin Hassan at approximately 2 p.m. on June 24, 2002, while distributing handbills across the street from the main

prior convictions from their employment applications. Neither case is remotely comparable to Teegardin's. One, Tony Ybanez, was fired within 3 weeks of being hired when an employee accurately reported to CBC that Ybanez had been convicted of raping her daughter. Respondent also claims to have terminated Dennis Riker less than 2 months after it hired him on October 1, 2002, for omitting information about his criminal record from his employment application. As Respondent did not introduce any documentary evidence regarding Riker, there is no way of determining the nature of his criminal record or whether he was fired for other reasons as well.

[7] There are two versions of Wilson's June 22 memo in Teegardin's personnel file. The version at Jt. Exh. 2, p. 274, discussed above, states that Wilson spoke to Teegardin about harassing people about union support. The versions at pp. 282–283 omit any mention of Teegardin's campaigning for the Union. These versions conform to the description contained on the back of the written warning Teegardin received on June 26, 2002 (Jt. Exh. 2, pp. 279–280). I find that the Wilson memo was modified with the intention of obscuring the fact that Wilson's discussion with Teegardin concerned union activity.

[8] In *Jensen Enterprises, Inc.*, 339 NLRB 877 (2003), the Board indicated that there may be situations in which an employer could forbid a prounion employee from discussing unionization with a particular employee or employees who complained to the employer about the union advocate's persistence. In the instant matter, CBC never identified any rank-and-file employee who complained to it about persistent and unwelcome prounion advocacy. Its attempts to curtail prounion employees from talking to other employees is thus overly broad—even assuming that such attempts were not invalid in other respects.

entrance to the CBC plant. I am unable to resolve differing versions of the incident given by Teegardin and union representative, John "Wayne" Purvis, on the one hand, and Hassan, on the other, as to who initiated the confrontation and whether Teegardin or Hassan initially suggested that they settle their differences with a fight. Although I find Hassan not to be a credible witness due to the internal inconsistencies and inherent implausibility in much of his testimony, Teegardin's and Purvis' testimony is also completely self-serving.[9]

What is established is that Hassan had recently angered Teegardin by walking through the CBC plant announcing sarcastically that Teegardin was promising employees a $3-an-hour raise if they selected the Union. Teegardin claims he never said any such thing. On June 24, Teegardin and Hassan called each other liars and exchanged challenges to fight—possibly at some place away from the plant.

Hassan, who works at the EZ Pack facility[10] and not at the main CBC plant, went into the plant immediately after the altercation and proceeded directly to the office of CBC's President James Appold. Hassan did not report the confrontation to the security guards as he passed their station nor did he report it either to his supervisor, Thomas Shoemaker, or Teegardin's supervisor.

Hassan testified that he went to Appold because he was the only person he knew he could turn to, despite the fact on June 24, he didn't know Appold personally; he merely knew "who he was." Hassan also testified that he told Appold he would quit if he had to "go through that to get to the Plant." He testified further that he wanted to make a police report but that Appold convinced him to simply write a statement for CBC instead. I find that this testimony is completely fabricated. If Hassan or Appold thought the incident was appropriate for police action, they would have summoned the police. A company investigation was performed precisely so that Teegardin could be disciplined without getting an opportunity to tell his side of story.

Hassan signed a statement written in the third person, which was typed by James Appold's secretary (Jt. Exh. 2, p. 281). The statement on its face is highly suspicious. Hassan dated the statement June 24, the day of the confrontation despite conceding on cross-examination that the document was not prepared on that date.

CBC issued Teegardin a written warning on June 26, 2002, for using obscene and threatening language against Kevin Hassan (Jt. Exh. 2, pp. 279–280). In support of the warning, the warning cites Al Wilson's warning to Teegardin about "harassment." At trial, Wilson confirmed that the written warning was predicated in part on his conversation with Teegardin on June 22 (Tr. 241).

Nobody in CBC management asked Teegardin or any of the union witnesses for their version of the confrontation prior to issuing him the written warning. This type of summary proceeding has repeatedly been found by the Board to indicate pretext rather than a valid nondiscriminatory basis for discipline, *Air Flow Equipment*, 340 NLRB 415, 420 (2003). This one-sided nature of Respondent's investigation is, however, but one of the reasons that I conclude that the written warning was issued to Teegardin to coerce him in the exercise of his Section 7 rights.

Another reason for my conclusion that the written warning was discriminatory is the disparate way in which Respondent treated Teegardin and Hassan. Respondent did not discipline Hassan for his role in this incident despite Hassan's acknowledgement that he was making sarcastic remarks about Teegardin throughout the plant prior to June 24, that he cursed at Teegardin on June 24, and at least accepted (if not initiated) a challenge to fight.

Respondent contends that it issued Hassan a verbal warning due to his conduct on June 24. However, Hassan's personnel file does not contain and never contained any record of such discipline (Tr. 13, stip. 33). At trial, Respondent introduced a document purporting to be a verbal warning issued to Hassan on June 26 by his supervisor, Thomas Shoemaker (R. Exh. 23).

In addition to the fact that this document was not contained in Kevin Hassan's personnel file, there are several other factors that lead me to conclude that Hassan was not disciplined. First of all, R-23 is neither signed nor dated. CBC routinely, although not always, documents verbal warnings on a "Counseling Form" (see, e.g., GC 6 p. 1271, Jt. Exh. 7, p. 656);[11] Hassan's "warning" is on a blank sheet of paper. The document contains the wrong date for the confrontation which occurred on June 24, rather than June 25.

Hassan's supervisor, Shoemaker, testified that the original "warning" was signed and that he gave it to a human relations employee named Deborah Lackey or Lackley. CBC did not call Ms. Lackey or Lackley and offered no explanation for the fact that the document was not in Hassan's personnel file. I conclude that Shoemaker either concocted this testimony or that a decision was made by somebody else in CBC management not to discipline Hassan because CBC did not disapprove of his conduct.

CBC has disciplined numerous employees, on other occasions, for the type of conduct for which the June 26 written warning was issued to Teegardin. However, I find that Respondent violated Section 8(a)(1) in issuing the warning based on its failure to adequately investigate the incident, the fact that the warning was in part predicated on the earlier admonishment relating to protected union activities and CBC's disparate

[9] Hassan's testimony is so inconsistent as to border on the nonsensical. For example, after some very confusing testimony on this point, I asked Hassan if he had told anyone that Teegardin was promising a $3-per-hour raise prior to June 24. Hassan answered, "No." Then I asked him why Teegardin was angry with him and he changed his testimony (Tr. 1729).

[10] EZ Pack is a subsidiary of CBC and manufactures equipment for CBC. It is housed in a building approximately 200 yards north of the main CBC facility, on the other side of a street named Myers Lane. The street which runs in front of the main plant entrance and which intersects with Myers Lane is Rader Road (Jt. Exh. 10).

[11] The counseling form contains a line for the employee's signature. If the employee refuses to sign the document, this is noted by a supervisor, apparently so that if the verbal warning is the basis for progressive discipline later on, the employee cannot contend he or she never received a verbal warning. Neither Hassan nor Shoemaker testified that Hassan signed the original to R-23; this is another reason I conclude that no genuine discipline was ever administered.

treatment of Hassan who may have been equally at fault, or even principally at fault.

Finally, assuming that Respondent acted on a nondiscriminatory basis in disciplining Teegardin, it violated the Act in giving him a written warning as opposed to a verbal warning or counseling. The written warning, a "next step" in Respondent's progressive discipline system was predicated on Wilson's June 22 "counseling" to Teegardin for engaging in protected activity (Tr. 241, 1339).

Respondent's Termination of Russell Teegardin on August 26, 2002

On the evening of August 7, 2002, employees were demonstrating in support of the Union, and other employees were demonstrating against the Union in front of the plant's main entrance on both sides of Rader Road. Russell Teegardin was on the plant side of the street.

Donald Whitted, an antiunion employee who had never taken part in any demonstrations against the Union, picked up two antiunion signs and made a point of walking over to stand next to Teegardin. Teegardin alleges that Whitted leaned his shoulder into him twice and followed him around. Teegardin also alleges that Whitted attempted to provoke a confrontation with him the next day by stopping his cart. Whitted denies these allegations.

I credit Teegardin because there is no doubt that Whitted was trying to provoke Teegardin on the night of August 7 (Tr. 1423).[12] Moreover, Teegardin immediately complained to his supervisor, Herb Telford, about Whitted's conduct (Tr. 993–994, 681–682). Telford reported Teegardin's complaints to Doug Benjamin and Al Wilson (Tr. 683). Respondent did nothing to investigate or follow-up on Teegardin's complaint. This is another indication of its animus towards Teegardin on account of his support for the Union. Respondent would have had no reason to automatically regard Teegardin's complaint as frivolous since it had suspended Whitted for 3 days just 4 months earlier for an altercation with Larry Priest, in which he drew blood (GC Exh. 32).

The next afternoon, August 8, as Whitted came to work, 15–20 employees were demonstrating in favor of the Union across the street from the plant's main entrance. Another 15–20 employees were demonstrating against the Union on the plant side of the street. As Whitted walked to the plant he put his thumb in his mouth sucked it, and yelled to the prounion employees, "Waa, Waa. Tell it to your Mother." Either Teegardin or Leo Hacker, another prounion employee, responded by yelling something about Whitted sucking the male sexual organ.[13] Whitted immediately turned to Teegardin and told him that he regarded the remark as constituting "sexual harassment" and that he was going to report Teegardin.

Respondent's Investigation of Whitted's Complaint Against Teegardin

Whitted went into the plant and complained about Teegardin's alleged obscene comment to Herb Telford, Teegardin's supervisor, and to his supervisor, Tony Wellington. Wellington is the same supervisor who complained to Dennis Babb about Teegardin's union activities in June. In a statement dated August 8, Whitted alleged that Teegardin grabbed his private parts and said "You spend a lot of time sucking this, don't you Don?" in front of more than 25 employees.

Respondent took statements from two employees who were in front of the plant at the time of the incident. It did not interview Teegardin or any witnesses known to be sympathetic to the Union. Moreover, Respondent did not make any inquires to its security guards about the incident nor did it review the videotapes of the front of the plant to determine whether they

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[12] Whitted's hostility towards Teegardin emanated entirely from the Union's organizing drive.

[13] Several prounion witnesses, Leo Hacker, Teegardin, Wayne Purvis, and Russell Ish testified that Hacker, rather than Teegardin, made this remark. Whitted and an antiunion employee named Brent Hendrix testified that it was Teegardin. I need not resolve this conflict in testimony because who actually made the remark is actually not that important to the resolution of this case. Having said that, I note that Hacker apparently claimed he made the remark within a month of the incident, thereby running the risk that CBC would terminate him as well.

On the other hand, I decline to credit either Whitted or Hendrix. The statement given to CBC by Jason Maynard establishes that there was a lot of yelling going on at the time and it may have been impossible for either Whitted or Hendrix to determine who made the remark (Jt. Exh. 2, p. 267). Whitted's hostility towards the Union was admittedly focused on Teegardin. This hostility was so extreme that Whitted was quite capable of accusing Teegardin even if he wasn't sure who made the remark or even if he knew it was not Teegardin.

In addition, Brent Hendrix's testimony is not credible. Hendrix admits that he was not looking at Teegardin when the offending remark was made. His recitation of what Teegardin said differs somewhat from Whitted's account. Also, his testimony at the hearing was greatly embellished when compared to the statement he gave to CBC in its investigation of Whitted's complaint and differs again from Whitted's allegations.

Hendrix's undated statement is as follows (Jt. Exh. 2, p. 266):

> . . . At one point, voices were raised behind me and to my left. I heard Russ Teegardin across the street yell something I couldn't make out and then finished with "suck on this." As I turned to look at Russ his hand was in front but not on his groin. . . .

At trial, Hendrix spiced his account up a bit:

> I hear some voices being raised . . . but to my left, I hear, 'You can suck on this.' And I turned right away as I heard it. And I see Mr. Teegardin with his hand in front of his crotch. (Tr. 1451.)
>
> JUDGE AMCHAN: Well, did you—when you heard "suck on this," before you turned and saw him, did you recognize it as Mr. Teegardin's voice?
>
> THE WITNESS: Before I turned and saw him, I can't say that I was 100 percent sure. I was about 90 percent sure, but you don't have to be a [Rhodes Scholar] to figure out that if you hear that and there's someone making the motions that he made—
>
> JUDGE AMCHAN: What motions—you said his hand was in front of his crotch. What motions was he making?
>
> THE WITNESS: He was pulling his hand in front of his crotch, pulling it up, I can't be much blunter than that. (Tr. 1452–1453.)

In addition to adding salacious details missing from his statement, Hendrix' account is inconsistent with Whitted's who said that Teegardin grabbed his private parts, but said nothing about Teegardin making a pulling motion. Hendrix also omits Whitted's account of his retort to Teegardin.

provided any corroboration for Whitted's allegations (Tr. 101–102).

Brent Hendrix was one of the witnesses interviewed by Respondent. It is unclear why CBC decided to take a statement from Hendrix or how it knew he was a witness. Hendrix testified that he was contacted by CBC's human relations department; he did not go to CBC with his account. Whitted certainly didn't provide management with Hendrix's name since he testified he did not know Hendrix or Jason Maynard, the other employee "witness" interviewed by management (Tr. 1443).[14] Hendrix confirmed that Whitted might not have known him by name (Tr. 1450).[15]

Respondent took no disciplinary action against Teegardin as a result of its investigation until August 26.

Respondent's Inquiry to Teegardin's Immediate Prior Employer

On August 15, 2002, the day of the representation election, Human Resources Manager Jack Johnson called Scott Gregory, who had supervised Teegardin when he worked for Hisan, Inc., in Findlay, Ohio. On his employment application in August 2000, Teegardin acknowledged that he had been discharged from Hisan, his most immediate prior employer, in June 2000.

Prior to the organizing campaign, Respondent made no attempt to determine the reasons for which Hisan fired Teegardin. Johnson testified that he called Hisan because someone in the plant indicated Teegardin had been discharged from Hisan for harassment. I find this testimony incredible and infer that Johnson was directed to make inquiries of Hisan by CBC's president, James Appold, who, as discussed below, initiated a second criminal background check on Teegardin 8 days later, after Johnson's inquiries to Hisan failed to provide any useful information.

Gregory told Johnson that Teegardin occasionally lost his temper and was aggressive but that he did not consider Teegardin's behavior to be harassment. He also told Johnson that Teegardin generally kept busy and did his job (Jt. Exh. 2, p. 270). The next day Johnson called a Chuck Curran at Hisan and spoke with Curran and Hisan's human resources manager, Pat Simian. They would not tell Johnson why Teegardin had been fired by Hisan, but "made it clear that it had nothing to do with sexual harassment."

CBC President James Appold Initiates Another Criminal Background Check

On or about August 23, 2002, CBC President James Appold initiated another criminal background search on Teegardin.[16] The timing of this search may be significant in that the Union filed its objections to the conduct of the election 2 days earlier. This search revealed that Teegardin had been convicted in 1987 for driving under the influence of alcohol (DUI). In August 2000, Teegardin answered "No" to the following question on his employment application: "Have you ever been convicted of a felony or misdemeanor other than a minor traffic offense which has not been expunged or sealed by a court?" Teegardin received a sentence of 180 days in jail and a $350 fine in 1987 for his DUI conviction. 177 days of the sentence were suspended.

Appold directed Vice President Larry Ivan to take Teegardin off the overtime schedule for the weekend of August 24 and 25 and told Ivan that Teegardin would be terminated on Monday, August 26, 2002, when Jack Johnson returned from a 1-week vacation. Also on August 23, Appold directed second shift supervisor, Donald Hager, to monitor Teegardin's union activities, record them and turn his notes into Appold. (Tr. 642–661, Jt. Exh. 2, pp. 293–294).[17]

On August 26, 2002, Jack Johnson and Al Wilson met with Teegardin and fired him. Respondent's stated reasons for Teegardin's termination are sexual harassment of Donald Whitted on August 8, 2002, and failing to report his 1987 DUI conviction on his August 2000 employment application.

Respondent Fired Russell Teegardin in Retaliation for Union Activities and to Discourage Any Further Union Activity at its Plant in Violation of Section 8(a)(3) and (1) of the Act

The evidence that CBC discharged Teegardin for discriminatory reasons is overwhelming. First of all, Dennis Babb admitted that a factor in his discharge was the June notation in his personal file which related to activities protected by Section 7 of the Act. Secondly, the woefully inadequate investigation of Donald Whitted's complaint against Teegardin indicates that Respondent's reliance on this incident is pretextual. Under these circumstances, Respondent's failure to conduct a fair investigation is evidence of discriminatory intent, especially when viewed in light of Respondent's hostility to the Union, *Metal Cutting Tools*, 191 NLRB 536, 542–543 (1971); *NKC of America*, 291 NLRB 683, 684 (1988); *Air Flow Equipment*, supra.

One example of this lack of fairness is CBC's failure to allow Teegardin an opportunity to defend himself before it decided to terminate him. This, in and of itself, supports an inference that Respondent's motive was unlawful, *Embassy Vacation Resorts*, 340 NLRB 846 (2003) (slip op. at p. 4). An even

[14] Maynard could not identify the individual who said, "Suck this." Jt. Exh. 2, p. 267.

[15] Jack Johnson testified that Whitted identified witnesses (Tr. 101). This testimony is inconsistent with that of Whitted and Hendrix.

[16] Jack Johnson testified that Linda Miller, Appold's personal secretary, who works only for Appold, performed the criminal background search (Tr. 106). Neither Appold, nor Miller, who still works for CBC, testified. I draw an inference from their failure to testify that their testimony on this issue would have been adverse to Respondent. Even without the adverse inference, the record establishes that Appold personally commissioned the search and that he did so to provide a pretextual basis or an additional pretextual basis for discharging Teegardin. Since Miller works only for James Appold, and since Respondent offered no other evidence as to who commissioned the criminal background check, it stands to reason that Miller's instructions came from Appold.

[17] At Tr. 657–658 Hager testified that, on August 23, Appold called him and directed him to write the memo that appears at Jt. Exh. 2, pp. 657–658 and submit it to Appold. One minute later Hager denied that he said what he had just testified to and stated that he took notes and submitted his notes to Appold on his own volition. I find that his first version of the story is the truthful and accurate account of what happened.

more obvious example is Respondent's reliance on only one antiunion employee to corroborate the allegations against Teegardin despite the fact that CBC knew that there were many other potential witnesses to the alleged exchange between Teegardin and Don Whitted.

Thirdly, Respondent failed to provide a credible nondiscriminatory explanation for its efforts to find additional grounds for Teegardin's termination, i.e., his prior work history and criminal background. This also indicates that the real reason was Respondent's, and more particularly, James Appold's personal animus towards Teegardin's union activities.

Indeed, the timing of Respondent's inquiry into Teegardin's work history is highly probative of a discriminatory motive for his termination. CBC made this inquiry on the day of the representation election, at the same time it was deciding to terminate, Lawhorn, the other most prominent union supporter. Similarly, I deem the fact that CBC President James Appold undertook a third inquiry into Russell Teegardin's criminal record on the same day that he directed Donald Hager to undertake surveillance of Teegardin's union activities as highly probative of discriminatory motive. Moreover, the timing of Teegardin's discharge 3 days after Hager engaged in this surveillance and reported his findings to Jim Appold is powerful evidence of discriminatory motive.

Finally, if there was any doubt as to Respondent's discriminatory motive in discharging Teegardin, it is dispelled by the overwhelming evidence of disparate treatment when compared with employees with no known union background, who committed offenses far more serious.

Disparate Treatment: Falsification of Employment Application

The disparity between Respondent's treatment of Teegardin and its treatment of similarly situated employees, without known union sympathies, establishes beyond any doubt that Respondent's stated reasons for his discharge are pretextual and that the real reason is his union activity. With regard to Teegardin's failure to note his 1987 DUI conviction on his employment application, Jack Johnson essentially admitted this was not a material omission. He admitted that CBC would probably have not done a criminal background check on Teegardin even if he had listed his DUI conviction of his application (Tr. 187). Johnson also admitted that this conviction would not have disqualified Teegardin from being hired.

More revealing is Respondent's lack of disciplinary action with regard to Marvin Hinton. When Hinton filled out his employment application on May 21, 2002, he denied that he had been convicted of any crime. CBC ran a criminal background check 2 days later and discovered that Hinton had pled guilty to a reduced charge of felonious assault in 1993, and entered a plea of no contest to a charge of nonsupport of his dependents in 1990.

On September 26, Hinton received a written warning for abusive language. Four days later he received a 1-day suspension. This action was taken after an employee complained that Hinton sat down next to him in the breakroom and said, "I want to fuck you in the ass, I'm going to take you home. You're my bitch." The employee said that Hinton also put his hand on his leg. This employee's account was corroborated by several other employees.

In contrast to CBC's treatment of Teegardin, Hinton's supervisor asked Hinton for his version of events. Hinton denied the accusations. His supervisor recommended a 3-day suspension and a 90-day probation period. Jack Johnson and Dennis Babb, both of whom were involved in the Teegardin termination, signed off on a 1-day suspension, little more than a month after they had fired Teegardin (GC Exh. 44).

Hinton had several other disciplinary actions before he was fired for an altercation with another employee on January 28, 2003. He had received six disciplinary actions within the 12 months prior to his discharge. Also on January 25, 2003, Hinton ruined six skids of product and falsified his report to the CBC laboratory.

The record also shows that where employees omitted critical details of their criminal history, Respondent did not inquire as to these details and even when it discovered material omissions, it did not take any disciplinary action. The most compelling evidence in this regard is the case of Willie Malone (GC Exh. 21). When Malone applied at CBC in June 2000, he noted that he had been convicted in June 1992, but supplied none of the details required on the application, such as the nature of the offense or disposition.

CBC performed a criminal background search and found that Malone had omitted the fact that he actually had spent much, or all of the last 20 years in prison for such offenses as robbery and drug trafficking. Respondent hired Malone anyway. In March 2001, Third-Shift Production Supervisor Dan Kear became aware of the extent of Malone's criminal history. Kear wrote a memo to H.R. Manager Jack Johnson about it. Johnson again declined to take any disciplinary action in part because Malone's last conviction was 8 years before his application (GC Exh. 21, p. 1413). Thus, while Respondent considered Malone's 8-year old conviction unimportant, it fired Teegardin for a 13-year old DUI conviction.

On October 13, 2000, CBC gave Malone a written warning for getting his car from the parking lot before clocking out (R. Exh. 19, 10). Respondent did not, as it did with Teegardin, take action against Malone for his materially incomplete employment application or institute any further inquiries regarding his background. Malone was ultimately fired by Respondent on June 13, 2001 for sexual harassment (R. Exh. 5, 5).[18]

Respondent notes that it has discharged a number of employees for falsifying company documents (R. Exh. 6). None of these instances is comparable to Teegardin's situation. They

[18] There are no details as to the nature of Malone's offense.

Other employees whose cases show disparate treatment are Joe Upshaw, who omitted the details on his felony conviction and was hired anyway. Upshaw was disciplined several times by CBC, including a suspension for having another employee clock in for him. There is no indication that CBC went back to his employment application looking for grounds to discharge Upshaw, as it did with Teegardin.

Also relevant is the record of Dana Hughes (GC Exhs. 20, 28, 42, and R. Exh. 19, 8). Hughes like Malone omitted the details of her criminal record from her employment application. She was disciplined several times before being fired and there is no indication that Respondent punished her for the omissions of her employment application.

include employees who obtained employment using a false identity who may not have been in the United States legally; employees who may have been probationary employees and employees who were granted leave on the basis of false representations.

Disparate Treatment: Sexual Harassment

First of all, I infer that Respondent did not have a good faith belief that Russell Teegardin "sexually harassed" Donald Whitted on August 8—even assuming for the sake of argument that it had a good faith belief that Whitted's account of the incident was accurate. The concept of "sexual harassment" is designed to protect working men and women from the kind of sexually based conduct that is severe and/or pervasive enough to create an environment that a reasonable person would find hostile or abusive, *Harris v. Forklift Systems*, 510 U.S. 17, 21 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986); *Baskerville v. Culligan Intern. Co.*, 50 F.3d 428, 430–431 (7th Cir. 1995); *Embassy Vacation Resorts, supra.*

Sexual harassment principles were not intended to create a general civility code for the American workplace. These principles are intended to prevent discrimination because of sex. Workplace harassment does not automatically constitute discrimination merely because an employee uses words, which have a sexual connotation. Thus, the plaintiff in a sexual harassment suit must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination because of sex. Discrimination is such conduct that alters the conditions of the victim's employment, *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 118 S. Ct. 998, 1002–1003 (1998). "Sexual Harassment" clearly does not encompass a single obscene remark and gesture of the kind Teegardin allegedly made to Whitted in the context in which this incident allegedly occurred.

Moreover, Respondent did not have a good-faith belief that sexual harassment encompassed such behavior. CBC did not, for example, have a higher standard of conduct for its employees than that set forth by Title VII case law. Respondent's handbook (Jt. Exh. 8, pp. 364–365) defines sexual harassment in a manner identical to the definition set forth at 29 CFR 1604.11, the Federal regulation promulgated pursuant to Title VII of the Civil Rights Act. Both define "sexual harassment" to include verbal or physical conduct of a sexual nature when 1) submission to such conduct is made a term or condition of employment, 2) submission to or rejection of such conduct is used as the basis for employment decisions, or "3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

Respondent's treatment of employees with no known union affiliation also establishes that it did not hold its employees to a higher standard of conduct than does Title VII. For instance, when Don Whitted complained that employee Larry Priest made an obscene gesture to him, CBC did not accuse Priest of sexual harassment. Indeed, there is no comparable incident that Respondent characterized in this manner.

Respondent's treatment of Priest is one of the many glaring examples of how disparately Teegardin was treated by Respondent compared to employees for whom there are no record of union involvement. On March 28, 2002, Priest made an obscene gesture to Don Whitted, the same employee involved in the incident with Russell Teegardin. That led to a series of events which culminated in Whitted giving Priest a bloody lip and bloody nose. Both Whitted and Priest were suspended for 3 days. Respondent did not accuse Priest of "sexual harassment" despite the fact that Whitted indicated that he had talked to Priest about his sensitivity to obscene gestures and obscene language "many times." (GC Exhs. 31–32, incl. p. 980).

Respondent's treatment of Whitted in April 2002 also demonstrates its disparate treatment of Teegardin in August. Whitted received no additional penalty on account of the written warning he had received for carelessness 4 weeks earlier. The April incident is also noteworthy in that Whitted was suspended in April despite the fact that he was apparently provoked by conduct he asked Priest to eschew several times previously. In contrast, Whitted was not disciplined for the August 8 incident even though he admitted to CBC that he had provoked the incident by sucking his thumb and taunting Teegardin by saying, "Go tell your mother." (Jt. Exh. 2, p. 271). It is also significant that even though Whitted claimed this was not a first offense by Priest and that their exchange led to physical contact, neither was terminated.

Respondent's sexual harassment policy does not require the termination of an employee found to have sexually harassment another employee. Rather it provides that such employee "will be subject to appropriate sanctions up to and including termination of employment." (Jt. Exh. 8, p. 364). This record is replete with many other instances of employees engaging in conduct, which clearly constitutes sexually harassment, and other employees making obscene gestures without being discharged. Even assuming that Teegardin "sexually harassed" Don Whitted, Respondent has not offered a reasonable explanation as to why it terminated him and not other employees guilty of far more serious offenses. Examples of this disparate treatment are as follows:

CBC terminated Chris Decarlo on April 16, 2002, after he admitted smearing cream cheese on the breast of a female employee. However, Decarlo was terminated only after he had been disciplined several times previously for touching female employees (GC Exh 12).

Everette Heishman was given a written warning on May 6, 2002, for verbal sexual harassment of a female employee (GC Exh. 13).

Anthony Syeh was given a 3-day suspension for sexual harassment on August 30, 2001, after five female employees complained about him. One claimed Syeh touched her more than once in the crotch and another claimed he repeatedly suggested they engage in sex (GC Exh. 14).

Joshua Walter was suspended by 1 day on August 23, 2001, when several employees complained that he grabbed his crotch on the production line (GC Exh. 17). Eleven months earlier, Walter was suspended for three days after a line leadperson complained to Don Hager that Walter was talking in a loud voice about sexual subjects, including fellatio, to a female employee. Hager interviewed Walter, the complaining lead and two witnesses (R. Exh. 15, 11 and 22).

Christopher Queisser admitted groping a female employee in March 1995; received a 3-day suspension for making a crude comment and sexual gesture in 1997; received a 5-day suspension when he admitted grabbing a female employee's behind in 1999. Queisser was terminated in October 2000 for giving a letter to a former girlfriend after she had told him she wanted nothing to do with him.

Bruce Lentz was fired on December 13, 2001, after he admitted making a sexual comment to a female employee. However, he had been warned and disciplined for sexual harassment several times before. In September 1998, Lentz was given a 3-day suspension after a female employee complained of repeated sexual harassment (GC Exh. 29).

Possibly the only employee fired on account of a first allegation of sexual harassment was David Boes, who was fired in 2000 for holding a female employee's arms back while another employee poured water on her chest (GC Exh. 15). This physical assault is in no way comparable to the transgression for which Teegardin was allegedly fired.[19]

Moreover, even if Teegardin's alleged misconduct was comparable to that of Boes, I would draw an inference of discriminatory motive from CBC's treatment of Teegardin. It is not enough for Respondent to prove that on some, or even most, occasions in the past it treated employees consistently with the manner in which it treated Teegardin. To meet its evidentiary burden, CBC would have to show that instances of disparate treatment were so few as to be an anomalous or insignificant departure from a generally consistent past practice, *Avondale Industries*, 329 NLRB 1064, 1066–1067 (1999).[20]

It is well settled under the National Labor Relations Act, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal, *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991); *Fast Food Merchandisers*, 291 NLRB 897, 898 (1988), *Shattuck Denn Mining Corp.*, 362 F.2d 466, 470 (9th Cir. 1966). I draw such an inference with regard to Respondent's discharge of Russell Teegardin.

In a case arising under the Age Discrimination in Employment Act, the Supreme Court reiterated the probative value of an employer's pretextual reasons for a personnel action in proving discrimination.

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. . . . In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." . . . Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 120 S.Ct. 2097 at 2108 (2000).

Thus, the falsity of CBC's explanation for Teegardin's termination is one of the bases for my conclusion that the real reason for his discharge was Respondent's animus towards his union activities.

William Lawhorn (Complaint Paragraph 30)

William Lawhorn worked continuously for Respondent from April 1991 until his termination on August 16, 2002, the day following the representation election. Prior to the commencement of the organizing drive, Lawhorn had received written warnings for absenteeism in December 2001 and in February 1997; a verbal warning for an unexcused absence in 1994; a verbal warning for improper work in 1993, verbal warnings for attendance issues in 1991, and a 3-day suspension for using another employee's ID badge to clock into work in 1991. Otherwise, Respondent appears to have deemed him a satisfactory employee.

In February 2002, Lawhorn initiated a meeting with the United Food and Commercial Workers Union (UFCW). He passed out authorization cards and union leaflets. Lawhorn also passed out union literature on the production lines. In February, Lawhorn was summoned to a meeting with Douglas Benjamin, the second-shift production supervisor, and Rick Quinn, the warehouse manager, who was his immediate supervisor's boss. Benjamin told Lawhorn that he would be disciplined if he continued passing out union flyers on the production lines.[21]

The UFCW's organizing efforts ceased shortly after they began. In March or April 2002, Lawhorn contacted the BCTGM and was one of the initial group of employees to meet with union representatives on May 14, 2002. He participated in the Union's first handbilling session across the street from CBC's main entrance on May 21. CBC management considered Lawhorn to be a spokesman for the Union (Tr. 316). Lawhorn and Teegardin stood out amongst the prounion employees because

[19] There is no evidence as to Boes' previous disciplinary record, if in fact he had one.

[20] Respondent also fired Karen Layton in August 2000, for repeatedly telling employees that she had a sexual relationship with a male employee and spreading sexually-related rumors about other employees. Layton's termination is consistent with Respondent's sexual harassment policy, which provides that false accusations of sexual harassment can result in disciplinary action (Jt. Exh. 8, p. 365). It appears from GC Exh. 16 that Layton's conduct may well have created an "intimidating, hostile or offensive work environment" for several employees.

[21] Respondent was entitled to prohibit the distribution of union literature in work areas—assuming that it did not allow distribution of other nonwork-related literature.

Lawhorn's uncontradicted testimony about his conversation with Benjamin is most relevant to complaint par. 12, alleging that Respondent violated Sec. 8(a)(1) by erecting signs at the outset of the public organizing campaign in May which indicated that the area in which employees were distributing union handbills was under video surveillance and "no trespassing signs." Respondent introduced evidence that the signs were ordered in March, 2 months earlier. Lawhorn's testimony establishes that high-level management personnel were aware of union organizing efforts at the plant before the signs were ordered.

they were out in front of the plant campaigning for the Union on a daily basis (Tr. 163).

On Saturday, August 10, Betty Gerren, one of Lawhorn's supervisors, stopped at his house. Lawhorn and two other employees, Frank and Bill Kelley, were making prounion signs. Gerren told Lawhorn in the presence of other employees that if the Union didn't win the representation election, Lawhorn would be fired (Tr. 869, 879, 1290). Gerren, who is still a supervisor at CBC (Tr. 508), did not testify in this proceeding. Thus, there is no evidence to rebut the General Counsel's evidence that Gerren made this comment. Moreover, in the absence of her testimony, or any other evidence to the contrary, I infer that Gerren was privy to information indicating that Respondent was planning or looking for an excuse to fire Lawhorn. It was incumbent on Respondent to call Gerren in order to elicit testimony that she had no objective basis for making this remark to Lawhorn, if that was the case.[22]

Lawhorn's August 13, 2002 Verbal Warning

The General Counsel alleges that Respondent violated the Act in giving Lawhorn a verbal warning on August 13, 2002, 2 days before the representation election. The warning was given for two incidents alleged to have occurred on Friday, August 9.

On August 9, Kelly Frey, one of Lawhorn's supervisors, told him to take a small package to the maintenance shop. Frey testified that she received a telephone call, from someone whose name she can't recall, informing her that Lawhorn had been in the maintenance shop for a half hour to 45 minutes talking to an employee named "Buddy." Lawhorn testified that he delivered the package and left the maintenance shop 5 minutes later to unload trucks. Although there is no non-hearsay evidence that Lawhorn spent 30–45 minutes in the parts room, I credit Frey's testimony. When Frey and Rick Quinn presented Lawhorn with the counseling form (Jt. Exh. 1, p. 181), his response was "o.k." (Tr. 1294–1295). If the accusations regarding this incident were unfounded, I would have expected Lawhorn to say so.

Frey also testified that later in the afternoon Lawhorn went outside with a cigarette and cup of coffee after he had already clocked in from his allotted break. Lawhorn denies that he had already taken a break when Frey came out to tell him to get back to work. However, Lawhorn does not claim that he was still on break, or that he told Frey he was still on his break. In view of this omission, I find that when Frey came out to get Lawhorn he should have been inside working. Thus, I dismiss the Section 8(a)(3) and (1) violation alleged in Complaint paragraph 30(a).

[22] The General Counsel alleges in par. 26 of the complaint that Respondent, through Gerren, violated Sec. 8(a)(1) in making this remark. I agree. The fact that Gerren may have intended the remark as a friendly warning does not negate the fact that it reasonably tended to interfere with the exercise of the Sec. 7 rights of all the employees present, *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975); *Trover, Inc.*, 280 NLRB 6 fn. 1 (1986).

Not only did Gerren predict Lawhorn's discharge; her remark would reasonably suggest to the other employees present that CBC would retaliate against them for their union activities, or support for the Union.

The Events of August 14, 2002 and Lawhorn's Termination

A preelection conference was held in CBC's training room inside its main facility in McComb at about 9 p.m. on the evening of August 14, 2002. CBC allowed several union officials into the plant to attend the meeting, including John Price, Bill Hilliard, and Wayne Purvis. Respondent was represented at the meeting by Jack Johnson, the human resource manager, Dennis Babb, the plant manager, and Respondent's attorneys. Numerous employees who were to serve as observers and runners during the election also attended, as did a NLRB agent.

Towards the end of the meeting, Union Representative John Price asked to see the election notices that were posted at the facility. Jack Johnson walked out of the training room and led a group of union representatives and supporters to a bulletin board just inside the security guard station and showed them an election notice posted on this board. Price asked to see the notices posted at two other parts of the McComb facility, the research and development (R & D) building and the EZ Pack building. Johnson told the union representatives that the R & D building was locked up for the night but that they could view the notice at the EZ Pack building (Tr. 72).

Johnson told the union representatives that he would make arrangements for somebody to meet them at EZ Pack but did not offer to escort them to this facility, which is located about 200 yards north of the main building, and on the other side of a street named Myers Lane. Johnson also did not offer to have a supervisor or manager escort a union representative to EZ Pack nor did he give directions as to how to get there.

Price asked Union Representative Bill Hilliard to go to EZ Pack to look at the election notice. Hilliard asked Bill Lawhorn to show him how to get there. Johnson may have been present when Hilliard asked Lawhorn to be his escort. Hilliard and Lawhorn then went over to security guard station and purchased hairnets from the security guard. CBC required that hairnets be worn in the production areas of the plant. Hairnets are not required in the EZ Pack building. Lawhorn and Hilliard then proceeded to take the most direct route to EZ Pack through the production area of the plant. Alternatively, they could have walked out the main entrance and then proceeded north along Rader Road, turned left and walked down Myers Lane and crossed the street to the EZ Pack facility.

Hilliard and Lawhorn made no effort to conceal the fact that they were walking through the production area. A number of supervisors were aware of their presence, including Herb Telford, Don Hager, and Betty Gerren. Production lines were running and the plant was fairly noisy. At some point Hilliard and Lawhorn encountered prounion employee Bill Kelley on his tow motor. They exchanged a few words with Kelley and then proceeded on their way out of the main facility.[23] At some point, Lawhorn and Hilliard were observed by employee Terry Kreisher. Hilliard and Lawhorn traveled through the production area in a matter of a few minutes. They went inside EZ

[23] All three testified that Kelley greeted Hilliard and Lawhorn and that Hilliard told Kelley they couldn't talk to him and continued on their way out the side of the facility. There is no credible evidence to the contrary.

Pack, looked at the election notice and then attempted to return to the main entrance the same way they came. However, the door was locked and Lawhorn and Hilliard had to walk around the building on the outside.

On their way back to the main plant, Hilliard and Lawhorn encountered CBC security guards on two occasions. One of the guards wrote a report (Jt. Exh. 1, pp. 159–160) in which he concluded, after talking to Herb Telford and Dennis Babb, that "no obvious vandalism noted nor inappropriate behavior other than the plant walkthrough."

Terry Kreisher's Testimony Regarding What Transpired on August 14, is Incredible

I find Terry Kreisher's testimony, that on the evening of August 14, Lawhorn, Hilliard, and Kelley taunted him by chanting "union time, union time," to be incredible. First of all, Kreisher embellished his testimony at trial. In a statement he gave to CBC in August 2002, Kreisher merely said that the three said "union time" without contending that they chanted this phrase three or four times (Jt. Exh. 1, p. 161; Tr. 1379–1380). Kreisher's testimony is also inconsistent with a statement given to CBC by Kevin Hassan, the passionately antiunion employee involved in the June confrontation with Teegardin. Hassan's statement (Jt. Exh. 1, pp. 163, 164) recounts that Kreisher approached him to tell him that Bill Hilliard was walking around the plant with Lawhorn. Kreisher apparently didn't say anything to Hassan about being taunted, or seeing Bill Kelley. Hassan reported what Kreisher told him to a security guard.

Kreisher also testified that he reported what occurred on August 14 to Donald Hager and Douglas Benjamin. Both of these management officials were called as adverse witnesses by the General Counsel and neither was called by Respondent. Neither testified to being informed of any improper conduct on the part of Lawhorn, Hilliard and Kelley by Kreisher. It is inconceivable that they would not have made notes if Kreisher had complained to them about the alleged taunting and it is inconceivable to me that Respondent would not call witnesses to corroborate Kreisher's testimony in light of the categorical denials of his account by Hilliard, Lawhorn, and Kelley.

Terry Kreisher also testified that he prepared a statement and gave it to Douglas Benjamin on August 15. Douglas Benjamin did not testify to receiving a statement from Kreisher. Human Resources Director Jack Johnson did not testify to receiving Kreisher's statement from Benjamin. Instead, Johnson testified that he talked to Kreisher sometime after August 26 to get a statement. Johnson didn't get a statement from Kreisher before August 26, because he was on vacation (Tr. 82). I thus conclude that Kreisher's testimony that he had given a statement to Doug Benjamin on August 15 is fabricated.

Similarly, Vice President Larry Ivan's notes of August 16, 2002, do not mention the Kreisher incident. Additionally, Human Resources Manager Jack Johnson testified that he attended a meeting with Ivan and CEO James Appold on the morning of August 15, at which he was told that Lawhorn had escorted Hilliard through the plant the night before. At this meeting nobody mentioned electioneering on the part of Lawhorn or any interaction between Lawhorn and Kreisher (Tr. 76–82). From this I conclude that CBC had no information alleging that Lawhorn engaged in "electioneering" when it fired him on August 16.

In general, I conclude that Kreisher concocted much of his testimony to curry favor with CBC management. Another reason for this conclusion is Kreisher's equally incredible testimony that he was accosted by Russell Teegardin a week before the election and reported the incident to Teegardin's supervisor Herb Telford (Tr. 1370–1371). Telford, who was called as an adverse witness by the General Counsel, made no mention of any complaint received from Kreisher about Teegardin. It is highly unlikely that such an incident occurred. When Don Whitted came to Telford with a complaint about Teegardin, Telford told him to put it in writing and then Telford immediately passed it on to Maintenance Manager Al Wilson (Tr. 289, 1419). If Teegardin accosted Kreisher there would be a notation about it in Teegardin's personnel file.

Finally, Kreisher's explanation regarding the "union time, union time" incident, that the three were trying to intimidate him to change his vote, is nonsensical.

Lawhorn's Termination

On August 16, the day after the representation election, shortly after Lawhorn arrived for work, Kelly Frey took him to the office of CBC vice president, Larry Ivan. Ivan informed him that he was being terminated for taking an unauthorized visitor through the plant. Prior to this meeting, Ivan and Human Resources Manager Jack Johnson conferred with Respondent's president, James Appold, about terminating Lawhorn (Tr. 85, 325–327). I discredit Ivan's and Johnson's testimony that Appold was merely informed of the decision. On the contrary, I infer that Appold was intimately involved in the decision to terminate Lawhorn. I draw this inference from Appold's highly unusual, if not unprecedented, interest in the activities and background of Russell Teegardin and the fact that Respondent did not call Appold as a witness.[24]

Contrary to Lawhorn's testimony, Ivan testified that he told Lawhorn that he was being fired for taking an unauthorized visitor through the plant *and* "electioneering." I find this testimony to be false. I do so because there is no credible evidence that as of August 16, CBC had any information regarding "electioneering" by Lawhorn while escorting Hilliard through the plant on August 14. Moreover, I find that the second page of Lawhorn's termination notice (Jt. Exh. 1, p. 158), which mentions "Bill's solicitation of an employee" and "union campaigning" on the part of Lawhorn and Hilliard, was created sometime after August 16; possibly after Jack Johnson talked to Terry Kreisher. I infer that Respondent created page 158 because it concluded that merely taking Hilliard through the plant was an insufficient basis for Lawhorn's discharge.

I conclude that page 158 was created sometime after Lawhorn was fired for many of the same reasons that I find Terry Kreisher's testimony to be incredible, such as the absence of

[24] Appold directed Supervisor Donald Hager to take notes regarding whom Teegardin talked to in the CBC breakroom and to turn his notes into Appold. Hager has not received similar direction from Appold regarding other employees (Tr. 642–661, 665). Appold also took an unusual interest in disciplinary matters involving union supporters other than Teegardin (Tr. 131–132).

any mention of electioneering in Larry Ivan's notes of August 16. However, I also draw this conclusion because there is no credible evidence as to who prepared the termination notice in Jt. Exh. 1 and when it was prepared. Ivan, who signed the front of the termination notice, p. 157, testified that Kelly Frey prepared p. 158, the reverse side of the notice (Tr. 330). Frey testified she did not prepare any part of this document (Tr. 434–435).

Analysis

I conclude that Respondent violated Section 8(a)(3) and (1) in discharging William Lawhorn. Respondent deemed Lawhorn the one of the most prominent leaders of the union supporters at CBC. It fired him precipitously the day after the representation election. Moreover, the reasons it proffers for his discharge are pretextual. I infer from the falsity of these reasons that the real reason for his termination was his protected activities in support of the Union.

With regard to pretext, Betty Gerren's unlawful comment to Lawhorn on August 10 (see fn. 22) indicates that CBC was looking for a reason to fire Lawhorn before the events of August 14. This supports an inference that Lawhorn's escorting Bill Hilliard through the production area was not the real reason for his termination. With regard to the second reason proffered for Lawhorn's discharge, I find that Respondent had no evidence that Lawhorn engaged in electioneering when it fired him.

As noted previously, Vice President Larry Ivan's notes of August 16, 2002, do not mention the Kreisher incident, which is the only evidence regarding electioneering by Lawhorn and Hilliard as they walked through the plant. Based on Ivan's failure to mention Kreisher in these notes, I find Ivan's testimony at Tr. 322–324 that he spoke with Kreisher on August 15 to be false.[25] As is generally the case in this matter when testifying about how they acquired information about the discriminatees, Respondent's witnesses can't recall how they learned about Kreisher's alleged interaction with Hilliard and Lawhorn (Johnson at Tr. 83; Ivan at Tr. 322).

I conclude that Kreisher's statement was not written on August 15, but was solicited by Respondent at a later date to support its allegations that Lawhorn and Hilliard were "electioneering" while they walked through the plant. Jack Johnson testified that he did not talk to Kreisher until about a week and a half after Lawhorn was discharged. When the General Counsel asked Johnson why he talked to Kreisher a week and a half after Lawhorn's discharge, Johnson answered, "I think we wanted to get a statement from him." (Tr. 82). This answer establishes that Respondent did not already have a statement from Kreisher and that the statement at Jt. Exh. 1, p. 161 was written not on August 15, but about August 26, when Johnson returned from a 1-week vacation.[26]

Larry Ivan testified that Kelly Frey told him about the alleged electioneering (Tr. 317–318). Frey's testimony at Tr. 429–434 includes nothing to indicate that she was told that Lawhorn and Hilliard were electioneering, nor that she told Ivan that they were electioneering. Frey wasn't at the plant on the evening of August 14. Betty Gerren, who told Frey about Lawhorn and Hilliard walking through the production area, didn't testify. Dan Kear, Gerren's supervisor, couldn't recall Gerren talking to him about Lawhorn and Hilliard (Tr. 508–509). Herb Telford's note about these events of August 14, also fails to mention any electioneering (Jt. Exh. 1, p. 162).

In addition to the fact that CBC had no information to support one of its bases for discharging Lawhorn, it also failed, as it did with Teegardin 10 days later, to give Lawhorn an opportunity to explain his actions before it decided to fire him. Respondent had already decided to fire Lawhorn when he talked to Ivan on August 16. This is another factor in my conclusion that Lawhorn's termination was discriminatorily motivated, *Publishers Printing Co.*, 317 NLRB 933 938 (1995); *Syncro Corp.*, 234 NLRB 550, 551 (1978).

Finally, I conclude that Respondent would not have fired Lawhorn for taking Hilliard through the plant on August 14, in the absence of its tremendous hostility towards the Union and Lawhorn's union activities. Indeed, its fabrication of an additional reason for the discharge "electioneering," proves that it would not have fired Lawhorn merely for taking Hilliard through the production area. While CBC did not authorize Lawhorn to take Hilliard through the production area, the situation was sufficiently ambiguous that an employer would not have discharged Lawhorn in the absence of antiunion animus.

Respondent was aware that Hilliard was inside its plant. It was aware that Hilliard was going to EZ Pack to look at the election notice. The shortest route to EZ Pack was through the plant. A reasonable person would not necessarily conclude, in the absence of instructions not to walk through the plant, that he or she was required to go out the main entrance and take the long way around to EZ Pack.

Moreover, Lawhorn and Hilliard made no attempt to hide what they were doing. They went to the guard shack and purchased hairnets. Thus, they tacitly informed the CBC guards that they were going through the production area since hairnets are not required inside the EZ Pack Building. The guards themselves attributed the incident to "miscommunication."

[25] Kreisher testified that he gave a statement to Doug Benjamin on August 15, which I conclude is false. Notably, however, Kreisher did not testify about being interviewed by Ivan (Tr. 1387–1405). This is another reason I find that Ivan's testimony about interviewing Kreisher, prior to firing Lawhorn, is false.

[26] Kreisher testified that the document at Jt. Exh. 1, p. 161 is a statement he gave to second-shift production manager, Douglas Benjamin, on August 15 (Tr. 1387). Benjamin was called as an adverse witness by the General Counsel, but was not called as a witness by Respondent. He did not proffer any testimony about receiving a statement from Kreisher, or even talking to Kreisher on August 14 or 15 about Lawhorn. I draw an adverse inference from Benjamin's failure to do so. Corroborating Kreisher's testimony was critical to Respondent's defense of its termination of Lawhorn given the following facts: 1) "electioneering" while he walked through the plant was one of the grounds given for Lawhorn's discharge; 2) the only evidence Respondent presented regarding "electioneering" was Kreisher's testimony; 3) this testimony was contradicted by Lawhorn, Hilliard, and Bill Kelley.

Kreisher was evasive when asked by the General Counsel whether he gave any other statements to Respondent (Tr. 1397–1398). I find that he did not do so and provided the statement at Jt. Exh. 1 p. 161 to CBC when Jack Johnson interviewed him sometime after August 26.

While Lawhorn and Hilliard possibly should have specifically asked Respondent for permission to take the shortest route through the plant to get to EZ Pack, an employer without a discriminatory motive would not have fired Lawhorn under these circumstances. Indeed, Vice President Larry Ivan knew before he fired Lawhorn that Lawhorn had made no attempt to sneak Union Representative Hilliard into the production areas of the plant. Ivan had reviewed a videotape that showed Lawhorn obtaining hairnets from a security guard and giving one to Hilliard (Tr. 321, 399–400).

The Termination of John Green

Respondent hired John Green in June 1997. At the time of his termination, Green worked as a machine operator on the second shift. He worked for Douglas Benjamin, the second-shift manager and various lead persons. Green was off of work from May 6 to July 13, 2002, due to a knee and shoulder injury. Green filed a workers compensation claim, which was allowed only for his shoulder; his claim for his knee is still in litigation. Green also filed a request with CBC for medical leave on June 6, 2002. He returned to work with restrictions for right-hand work only in July. These restrictions expired at the end of August.

Friday, September 9, 2002, was Green's first day back at work without restrictions. His immediate supervisor that day was leadperson Holly Gerdeman. Gerdeman assigned Green to run one of three Peters machines, which insert the crème into sandwich cookies and crackers. Green asked to be assigned to a different Peters machine than the Peters machine 1. Green testified he did so because the operator doesn't have to climb under as much equipment to reach the other machines. Gerdeman testified she told Green that she was assigning him to Peters machine 1 because it was the most difficult Peters machine to operate and because Green was her most experienced operator.

After a relatively short time, Green told Gerdeman that he wanted to go home. Gerdeman allowed him to do so and found another employee to run Peters machine 1. Green testified that he told Gerdeman that he was having a lot of problems with his knee and shoulder. Gerdeman testified that Green simply told her he wanted to leave and didn't give a reason.

On Monday, September 9, his next scheduled workday, Green called a CBC security guard to say he was not coming to work; he did not give a reason. He did not call in or report to work on September 10 or 11. On September 11, 2002, however, Green did go to the office of his physician, Dr. James J. Davidson. Davidson gave Green a slip stating "seated work only until MRI of knee." (Jt. Exh. 5, p. 528). Green took this slip to CBC on September 11, and gave it to a woman named Maureen, who is the employee in charge of workers compensation in the CBC human resources office (Tr. 129, 1260–1261).

When an employee brings in a physician's slip indicating the need for restricted activity, CBC's human resources department normally sends the slip to the production floor to determine whether or not there is work available consistent with the employee's restrictions. A management representative then calls the employee to inform him or her whether such work is available (Tr. 130–131, 695). The normal procedure was not followed in Green's case.

Green had an MRI on his knee on September 13, at Dr. Davidson's office. While he was there, one of Dr. Davidson's employees faxed the results of the MRI to CBC.[27] The MRI showed a meniscus tear. Green did not report to work or have any contact with Respondent after September 13. However, in accordance with CBC procedure, Respondent should have contacted him as to whether work was available with his restrictions. CBC did not do so. Instead, on September 18, Doug Benjamin signed a termination slip that had been prepared by Dean Snyder, a CBC labor coordinator.

At page 87 of its brief, Respondent contends that the General Counsel failed to produce any evidence that it was aware of Green's "alleged union activities." This is incorrect. While he was on medical leave during the organizing campaign, Green passed out handbills on behalf of the Union; his supervisor, Douglas Benjamin, was aware that he was doing so (Tr. 697). Benjamin, as a common practice, reported the union activities of CBC employees to his immediate supervisor, Gary Birkemeyer, and possibly other members of higher-level management (Tr. 700–701).

Moreover, Donald Hager specifically mentioned Green in his memo to CBC President James Appold on August 23, 2002, regarding his surveillance of the union activities of Russell Teegardin, who was fired 3 days later. Hager reported, "Generally when Russ is in the brake [sic] room he will have Jim Kelly, Chuck Thomas, John Green, and Mark Oakley and Tony Daughenball." (Jt. Exh. 2, pp. 293–294). Thus, not only was CBC aware of Green's union activities, it associated his union activities with those of Russell Teegardin whom it fired for union activities 3 weeks before it terminated Green.

I find that CBC violated Section 8(a)(3) and (1) in terminating John Green. CBC was aware of Green's union activity and from the record as a whole, particularly the circumstances of the Teegardin and Lawhorn terminations, I infer it harbored an extreme degree of animus towards any union activity or support for the Union by any CBC employee. Additionally, I infer specific animus towards Green because Respondent, as evidenced by Hager's notes, believed him to be a close associate of Teegardin.

Moreover, I find Green's termination discriminatory because, for reasons unexplained in this record, CBC departed from its normal procedures for handling medical restrictions slips. I infer this departure was motivated by a desire to terminate a known union supporter.

Finally, I base my finding of discriminatory motive on Respondent's disparate treatment of Green compared with its treatment of employees not known to be union supporters. CBC contends that if an employee fails to show up for work and doesn't call in for 3 days, termination is automatic (Tr. 203). However, the case of Kim Combs-Mason (GC Exh. 45)

[27] I credit Green's testimony in this regard. Maureen did not testify and CBC did not contradict his assertion that the results of the MRI were faxed to it on September 13. In any event CBC received Dr. Davidson's slip regarding "seated work only" on or before September 13.

establishes that this is not so. Less than a month after CBC terminated Green, Ms. Combs-Mason did not report to work or call in for 3 successive workdays, October 11, 14, and 15. On October 17, 2002, Kelly Frey gave Combs-Mason a verbal warning. Jack Johnson signed this warning on October 24. During the organizing campaign Combs-Mason openly displayed her opposition to the Union by wearing an antiunion T-shirt in the plant (Tr. 514).

Respondent has offered no explanation for the disparate treatment of Green compared with Combs-Mason. It also has offered no testimony as to what, if any, consideration, was given to Green on account of Dr. Davidson's restrictions, or the results of the MRI, both of which it was aware of by September 13. Respondent did not call Dean Snyder or Maureen as witnesses. I draw the adverse inference that it did not so because their testimony would have been adverse to Respondent, *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988). I infer that their testimony would have indicated that Respondent ignored Dr. Davidson's note because CBC was looking for an excuse to fire Green for his union activities.

Gary Hill and Thomas Thompson

Complaint paragraphs 33 and 34 allege that Respondent violated Section 8(a)(3) and (1) by issuing written warnings to Gary Hill and Thomas Thompson on November 5, 2002, and discharging Hill and Thompson on January 3, 2003. CBC hired Hill on April 17, 1989. Respondent hired Thompson on April 23,1990. In mid-2001, Respondent installed a machine called a palletizer in its warehouse. This device automatically stacks boxes of cookies and crackers on skids, thus obviating the need for manually stacking. The palletizer system also runs stacks of boxes through a machine that wraps cellophane around the boxes and may put corner guards on the pallet. Only some production lines fed boxes into the palletizer, the others were still stacked manually.

Respondent interviewed employees who applied for the position of palletizer operator in 2001. Although the subject of overtime work was discussed in these interviews, I do not credit the testimony of Richard Quinn and Al Wilson that applicants were told that they might be required to work overtime without any prior notice.[28] Hill and Thompson were among those selected for this position. There were palletizer operators for each shift and normally there were three on the first shift, Hill, Thompson, and Keith Shetzer.

Hill and Thompson actively supported the Union and distributed union handbills out in front of the main entrance of the McComb plant at least once a week. The warehouse manager, Rick Quinn, saw Hill and Thompson doing so "quite a bit" when he came to work (Tr. 762). They continued distributing union handbills after the August 15 election through December, at least once a month.

On, or just prior to June 27, 2002, Quinn approached Hill and Thompson and told them that he had received complaints about them harassing people about the Union. Quinn told Hill and Thompson that they should watch who they talked to about the Union. Thompson asked Quinn who was complaining about them. Quinn said he didn't know, he was relaying a message from people up front (Tr. 1132).

Quinn testified that he approached Hill and Thompson on the basis of a report from a CBC supervisor, whose name he can't recall. Quinn testified that this supervisor received a complaint from a rank and file employee, whose name he also can't recall, that the employee "didn't feel comfortable" with Hill and Thompson promoting the Union (Tr. 761–762).

Unbeknownst to Hill or Thompson, Quinn wrote virtually identical notes about this conversation and put them into Hill and Thompson's personnel files (Jt. Exh. 6, p. 575; Jt. Exh. 7, p. 706). The note in Hill's file reads as follows:

> I informed Gary Hill today that several complaints have been received concerning his solicitation of fellow employees while on working time. I reminded him this is against company policy and any further complaints received will result in disciplinary action.

As I found with respect to a similar warning given to Teegardin, Respondent restrained, coerced, and interfered with Hill and Thompson's Section 7 rights in violation of Section 8(a)(1) of the Act. It did so by verbally restraining their protected rights and also by placing this memo in their personnel files. Even had CBC received complaints from rank-and-file employees, the fact that an employee may not want to hear a solicitation or repeated solicitations on behalf of the Union does not negate its protected status. This is so even if the employee subjectively considers such appeals to be "harassment," *Nichols County Health Care Center*, 331 NLRB 970, 981 (2000). Moreover, there is no evidence in this record than any nonsupervisor complained to CBC management about Hill and Thompson. For the reasons I previously articulated with regard to the Teegardin warning, I find this violation to have been fairly and fully litigated despite the fact that it was not alleged in the complaint.[29]

[28] Gary Hill and Thomas Thompson dispute Quinn and Wilson's testimony on this matter, which is extremely self-serving. Neither Quinn nor Wilson took notes of the interviews and there is no other corroboration for this testimony. Al Wilson's testimony is also internally inconsistent. After testifying about the importance of 24-hour coverage, Wilson was asked,

> Did you convey that to Mr. Hill during this interview?
> We didn't go into specifics. That—we—you know, we informed him that it is a very important position. . . .

Then in response to leading questions, Wilson testified that he did talk about the importance of 24-hour coverage to Hill and Thompson (Tr. 1559–1560). He went on to testify that he explained to Hill and Thompson that in the event that neither operator from second shift showed up they would have to stay until "we got other arrangements made." I find that either Wilson had no recollection of what he told Hill and Thompson in these interviews and/or that his testimony is completely fabricated.

Respondent's witnesses testified that there were written position descriptions for the palletizer operators, which discuss overtime requirements. These were not introduced into evidence. In any event, Thompson testified he never received a written job description.

[29] While an employer may prohibit the discussion of nonwork-related topics during working time, it cannot limit such a prohibition to unions or other protected subjects, *Altorfer Machinery Co.*, 332 NLRB 130, 133 (2000); *M. J. Mechanical Services*, 324 NLRB 812 (1997).

On August 21, 2002, Kelly Frey, who supervised the palletizer operators, gave Thompson and Keith Shetzer a verbal warning for an unauthorized break. Thompson admits he that he did not start work on time on that date and there is no allegation that this warning was discriminatory. When giving Thompson this warning, Frey mentioned the fact that Thompson had missed work on August 16. Thompson said he had overslept; Frey said he should have called in. They argued about whether Thompson was required to call in and then Frey told him to stop playing games because his Union was not around to protect them now (Tr. 1113).[30]

The palletizer did not become fully functional until September 2002. Packages run on conveyor belts to the palletizer system. They are initially transferred into the palletizer system by a conveyor called an induct or infeed conveyor. During the fall of 2002, Respondent was having recurring problems with the palletizing system. One of these recurring problems involved the NT computer, which initially keeps track of the cases going into the palletizing system.

The visual basic computer program in the NT computer stopped working periodically. When this occurred an error message appeared on the screen of the NT computer. Other error messages appeared when the visual basic program continued to operate. If an error message appears on the computer screen, a person would have to check the task manager function on the computer to determine which computer programs were not responding. If the visual basic program was not responding, the NT computer was not counting the cases going through the palletizer. If the palletizer continued to run, the cases would have to be counted manually.

On the third shift, Sunday night to Monday morning, November 3–4, 2002, the visual basic program did not work. The third-shift operators continued to run cases through the palletizer during the entire shift. This required Supervisor Kelly Frey and another employee to perform a physical inventory for this shift and the second shift for Friday, November 1. It took Frey and this employee 4 hours to do the manual inventory.

On Monday, November 4, Rick Quinn, the warehouse manager, told Tom Thompson that if the same problems with the NT computer occurred, the palletizer operators should shut off the infeed conveyor immediately (Tr. 439). This would prevent cases from going through the palletizing system without being recorded by the NT computer. Thompson, in accordance with instructions from Quinn, conveyed this message to Gary Hill.

On November 4, the NT computer stopped working again.[31] Hill noticed that the computer screen had an error message. He did not shut down the infeed conveyor to the palletizer. Hill contends that this was not a recurrence of the problem that had occurred on Sunday night, but a different problem. According to Hill, on the prior occasion, the computer screen did not display the program for the palletizer. On November 4, Hill contends that the palletizer program was visible but that there was an error message in the middle of the screen. Additionally, an icon, which normally blinks, was not doing so. Respondent contends that the problem with the NT computer was at least not materially different than the one experienced previously.

Hill went into Kelly Frey's office and told Frey that there was an error message on the NT computer screen. Frey went to the computer and tried to get it to work properly. At some point she shut down the computer and rebooted it. During this period, Frey did not tell Hill to shut off the infeed conveyor to the palletizer.

On November 5, 2002, Kelly Frey and Rick Quinn presented Hill, Thompson and Keith Shetzer written warnings. These warnings alleged that the three palletizer operators neglected to shut down the infeed conveyor to the palletizer when the NT computer was down on November 5. Frey and Quinn testified that between 1:30 and 2 p.m. on November 4, Quinn instructed all the palletizer operators from the first and second shifts to immediately shut off the infeed conveyor whenever the NT computer was down. Hill and Thompson contend no such meeting ever took place.

I conclude that the General Counsel has not established that the written warnings issued to Hill and Thompson on November 5, 2002 were discriminatorily motivated. The General Counsel has not established that the warnings were unwarranted. Moreover, even if the warnings were undeserved, there is insufficient evidence that Respondent was motivated by antiunion animus in issuing them.

The January 2003 Terminations

In the month of January 2003, Respondent fired four known union supporters; Gary Hill and Thomas Thompson on January 3; Tyrone Holly on January 20, and Patti Wickman on January 21.[32] The General Counsel alleges that all four discharges violated the Act. The General Counsel's case regarding Hill, Thompson, and Wickman is supported by the timing of the discharges in relation to the December 2002 handbilling by these employees in front of the plant. I infer that Respondent was aware these employees' union activity in December because this area was under constant video surveillance by CBC.

I reiterate the fact that Respondent's willingness to fire Teegardin, Lawhorn, and Green for their union activities sup-

CBC concedes that employees were allowed to discuss nonwork subjects while on the clock and employees and supervisors regularly discussed the union campaign during working time.

[30] Frey did not contradict Thompson's testimony.

[31] Thompson also testified that this incident occurred on November 4. Kelly Frey testified that it occurred on November 5, the day she and Rick Quinn gave Hill and Thompson a written warning.

[32] During the same period CBC fired three other employees, all for excessive absenteeism (R. Exh. 21).

Respondent suggests that the fact that it terminated 37 employees during the period August 16, 2002, through January 21, 2003, supports its contention that terminations were a common occurrence at CBC and that the discriminatees were treated no differently than anybody else. According to R Exh. 21, 19 of the 37 employees terminated during this period were fired for excessive absenteeism, 5 (including John Green) were terminated for neither calling in nor showing up for work for 3 consecutive days, 1 was fired for failing a drug/alcohol screen, 1 was terminated for being denied a raise three times within 12 months, 1 was terminated for walking off the job without permission, 2 were fired for falsifying their employment application and 8, including 6 of the discriminatees, were terminated for improper conduct. Obviously, the terminations for absenteeism have no bearing on this case and the circumstances of many of the others must be examined to determine their relevance.

ports the inference that it fired Hill, Thompson, Holly, and Wickman for discriminatory reasons. However, I draw this inference from the record as a whole, including the pretextual reasons Respondent advanced for these terminations and the disparate treatment of the discriminatees compared with employees for whom there is no evidence of union activity or support.

The January 3, 2003 Termination of Gary Hill and Thomas Thompson

On January 3, 2003, Kelly Frey summoned Gary Hill into her office and presented him with a termination notice for alleged insubordination and leaving work without permission on December 26, 2002. The reverse side of the form that Frey presented to Hill is different from that in Hill's personnel file. The reverse side of the termination notice that Hill received is GC Exh. 53. Hill never saw the document in Jt. Exh. 6, p. 567 until he testified in this proceeding.

On the same day, Frey also presented Thomas Thompson with a termination notice. It purported to terminate Thompson on the grounds that he had received three written warnings in a 12-month period. Thompson had received two written warnings and a verbal warning during the preceding twelve months. The third warning was a written warning for leaving work without permission on December 26. Respondent's employee handbook (Jt. Exh. 8), contains lists of two types of conduct that may lead to disciplinary action. Section A offenses are those which may lead to discharge regardless of an employee's past record. Section B offenses are those generally subject to progressive discipline. The handbook states, "Any employee who receives three (3) warnings within any twelve (12) month period *may* be discharged" (emphasis added).

Neither CBC Vice President Larry Ivan, who testified that he made the final decision to fire Hill and Thompson, nor Warehouse Manager Rick Quinn, spoke to Hill or Thompson about the incident which led to their discharge prior to their termination. An employer's failure to permit an employee to defend himself before imposing discipline supports an inference that the employer's motive was unlawful, *Embassy Vacation Resorts*, 340 NLRB 846, 849 (2003). I find that neither Kelly Frey nor Rick Quinn recommended, suggested, or participated in any meaningful way in these termination decisions. With regard to Frey, I reach this conclusion on the grounds that on December 26, she threatened Hill and Thompson with a reprimand, not discharge and because her testimony indicates that she did only what she was directed to do by Richard Quinn and Larry Ivan.

When Quinn was walking Hill out of the CBC plant on January 3, Hill reminded Quinn of a statement Quinn had made to him in the summer of 2002. Quinn told Hill at that time that as long as he was "back there" Hill would always have a job. On January 3, Quinn replied that "it was out of his hands." (Tr. 1075). From this I infer that Quinn was not a decision maker with regard to the termination of either Hill or Thompson. Respondent did not call Quinn to contradict Hill's testimony or to proffer a different explanation for Quinn's statement. Finally, Ivan's testimony that he and Jack Johnson made the decision to fire Hill and Thompson belies Quinn and Frey's testimony that they had any role in the decisionmaking process (Tr. 341, 349).[33]

The Events of December 26, 2002

During the week between Christmas and New Year's Respondent was operating on a reduced schedule. Only 5–7 production lines were running, compared to 10–12 production lines on normal workdays. The palletizer was stacking cases from only two of these lines. Normally, eight to nine lines run to the palletizer. Only two palletizer operators, Hill and Thompson, were scheduled on the first shift. Bob Avery, the second shift supervisor, scheduled only one palletizer operator, Victoria Truesdale, for the second shift.

The second shift palletizer operators report to work at 1:30 p.m. so that there is a half-hour overlap with the first shift, which ends at 2 p.m. Victoria Truesdale was late to work on December 26, so that nobody showed up to relieve Hill and Thompson at 1:30. At about 1: 40 Hill began paging his supervisor, Kelly Frey. After paging Frey three times, Hill informed Eric Blasius, who had worked as a leadperson earlier that day, that he had to leave at the end of his shift and that he was going to shut off the palletizer. A few minutes later, Hill called leadperson Dean Rutter and informed Rutter either that he had shut down the palletizer, or that he was about to shut it down. Rutter saw Supervisor Kelly Frey in his work area and called her to the telephone to speak with Hill.

Hill informed Frey that Victoria Truesdale had not shown up for work yet. Frey asked about Sherry Sprague, another second shift palletizer operator. Hill informed Frey that Sprague was on vacation. Frey told Hill that either he or Thompson had to stay and continue to run the palletizer. Hill told Frey that he had an appointment with his attorney and had to leave work at the end of the shift. He also told Frey that Thompson had ridden into work with another employee who was leaving at 2 p.m. Frey then told Hill that both he and Thompson had to stay beyond the end of their shift. Hill told Frey that Thompson would stay if she could find him a ride home; Frey declined to do so. At about 1:53 Hill shut down the palletizer.[34]

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[33] The parties stipulated at Tr. 13 that Frey, Quinn, and Ivan "made the decision that Hill and Thompson would be fired." A trial court may disregard a stipulation between parties if the evidence to the contrary is substantial, *U. S. v. Retirement Services Group*, 302 F.3d 425, 430–431 (5th Cir. 2002). Because substantial evidence establishes that Frey and Quinn played no role in the decision to terminate Hill and Thompson, I disregard the parties' stipulations in this regard.

[34] Hill had paged Kelly Frey several times before he was able to talk to her. The record indicates that he shut down the palletizer between the time he spoke to Blasius and the time he spoke to Frey.

Dean Rutter's testimony regarding the events of December 26 is completely incredible. For one thing, it is internally inconsistent. At first Rutter testified that he realized that the palletizer had been shut down when packages began falling on the floor. Then he testified that he talked to Hill, who informed him that he was going to shut down the palletizer. At Tr. 1526, Rutter testified as to what he "probably" did, which leads me to conclude that Rutter essentially made up his testimony as he went along. Finally, Rutter prepared a written statement dated January 7, 2003, in which he fails to mention anything about boxes falling all over the floor (Jt. Exh. 6, p. 571)—thus I conclude that his testimony at trial was greatly embellished as compared with what he actually recalled.

Hill, by virtue of having seniority over Thompson, had a right, pursuant to CBC's employee handbook, to refuse to stay at work past his shift (Jt. Exh. 8, p. 16, Tr. 387). Respondent conceded that pursuant to its handbook, Hill could not be required to stay past the end of his shift on December 26 (Tr. 1706).[35]

There were at least two people in the plant on the second shift on December 26 who could have operated the palletizer, Frey and Rodney Vollmer, who previously had been a second-shift palletizer operator. Moreover, Richard Quinn's testimony indicates that there were other employees who could have operated the palletizer in an emergency (Tr. 806).

Finally, while shutting down the palletizer may have slowed down production, it didn't stop it. Cases from the two lines running to the palletizer would have been stacked manually as were the other three to five production lines operating that day. Moreover, lines running to the palletizer had to be stacked manually on numerous occasions when the NT computer was malfunctioning.

Frey told Hill that if he and Thompson left that they would be reprimanded. She did not threaten them with discharge. Frey spoke directly only with Hill on December 26; not with Thompson. Hill and Thompson clocked out after their shift ended. On their way to the main entrance they saw Victoria Truesdale who clocked in at or a few minutes after 2 p.m.[36] Production lines were running into the palletizer by 2:23 p.m. (Jt. Exh. 6, p. 605).

Hill and Thompson worked December 27, 30, 31, and January 2. No management official said anything to either of them about the events of December 26, until they were called into Frey's office on January 3, and summarily discharged.

The Discharge of Hill and Thompson Violated Section 8(a)(3) and (1) of the Act

I find that the discharge of Gary Hill and Thomas Thompson was part of an effort by Respondent to bring an end to union activity at the McComb plant, which had continued sporadically after the August 15 representation election. Hill and Thompson were among those prounion employees who continued to distribute union literature across the street from the plant on a monthly basis. As stated before, I infer that Respondent was aware of this handbilling by virtue of the fact that the area in front of the plant was under constant video surveillance.

At page 100 of its brief, Respondent contends that there is no evidence that either Hill or Thompson engaged in any protected activity between the August 15, 2002 election and their terminations on January 3, 2003. On the contrary, Union Representative John Price testified that Hill and Thompson, as well as discriminatee Patti Wickman, were among those who distributed union literature in front of the CBC plant in September, October, and December 2002 (Tr. 1020–1023). Hill also testified, without contradiction, that he distributed union literature on several occasions after the election (Tr. 1051). Due to the pretextual reasons given for the four January discharges, I infer that Respondent's high-level management was extremely hostile towards this renewed union activity and that following the December 2002 handbilling, CBC made a decision to terminate as many known union supporters as possible in order to bring organizing activities at the plant to a halt.

One factor that indicates pretext is that the decisionmakers were not the least bit interested in hearing Hill and Thompson's explanation of what occurred on December 26. Secondly, while the shut down of the palletizer was, at it turned out, briefly harmful to production, Victoria Truesdale, who was a half-hour late for her shift, and Bob Avery, who scheduled only one palletizer operator for the second shift, were at least as responsible for this problem as Hill and Thompson. Neither Truesdale nor Avery was disciplined for their role in the incident.[37]

Most importantly, I find that an employer without a discriminatory motive would not have fired Hill and Thompson for the events of December 26. CBC has made no contention that the reasons given by Hill and Thompson for refusing to stay past their shift were not legitimate. Indeed, Thompson testified without contradiction that he routinely worked overtime and on one occasion stayed late on very short notice (Tr. 1139). Moreover, Respondent now concedes that Hill was properly exercising his prerogative under the CBC handbook to refuse overtime. Also Respondent makes no claim that Frey or anyone else in management made any attempt to address the fact that Thompson would have had no way of getting home if he stayed past 2 p.m.

Additionally, the evidence indicates that Kelly Frey was in Rutter's work area at the time that Hill shut down the palletizer, or almost immediately thereafter. If boxes were falling all over the floor, Frey would have noticed; she testified that she did not see boxes on the floor (Tr. 456).

Kerry Shoemaker, another leadperson, also testified that packages started falling to the floor when the palletizer was shut off. As did Rutter, Shoemaker prepared a written account of what she recalled which appears in Gary Hill's personnel file (Jt. Exh. 6, p. 574). This account makes no mention about packages falling to the floor or any other consequence of the palletizer shutting down. I would expect that Respondent would have documented any significant damage or problem caused by the fact that Hill and Thompson shut down the palletizer. In part because there is no such documentation, I find that there is no evidence that their actions damaged any product and had any effect on production other than the interlude of about 30 minutes during which two production lines were not being conveyed to the palletizer.

[35] On September 29, 2003, Kelly Frey testified that she told Hill that both he and Thompson had to stay because she didn't know whether Hill or Thompson had more seniority. She further testified that Hill and Thompson left work before she could make this determination, but that she intended to force the lower seniority person to stay (Tr. 1686). I discredit this testimony for several reasons: 1) Frey gave no such explanation to Hill; 2) she gave no such explanation to VP Larry Ivan, who was unaware of this problem in Respondent's case until the Charging Party's attorney raised it with him (Tr. 383–388), nor to her immediate supervisor, Rick Quinn (Tr. 801–802); and 3) Frey testified two months earlier on July 30, and gave no such explanation for requiring both Hill and Thompson to stay past the end of their shift.

[36] When Frey demanded that Hill and Thompson stay at work, neither she nor they knew when or if Truesdale would show up for work. Frey did not indicate to Hill or Thompson how long they might have to stay.

[37] Kelly Frey testified that Truesdale received attendance points for being late, but no other discipline.

Finally, Respondent has offered no explanation for why it fired Thompson on the grounds that he had three warnings within a year, when it routinely imposes lesser forms of discipline on other employees with three warnings in a 12-month period.[38] Many of the employees who were not fired for their third offense with 12 months committed infractions which appear, at first glance, far more serious than those committed by Thompson. For example, Kim Combs-Mason received her third disciplinary action within twelve months on January 17, 2002 (GC Exh. 45, p. 1321). This warning was signed by Human Resources Director Jack Johnson and Rick Quinn, who was also Thompson's supervisor, as well as initialed by Plant Manager Dennis Babb. Combs-Mason, who openly opposed the Union later in the year, received two warnings emanating from customer complaints and also had been suspended for 3 days for sleeping on the job. Respondent has offered no explanation for the disparate treatment of Thompson compared to Combs-Mason and other employees.

Thompson's infractions were a verbal warning in August for not being at his workstation on time; a written warning for failing to shut off the infeed conveyor to the palletizer when the NT computer was malfunctioning on November 5, and a written warning for leaving work without permission on December 26, 2002.

In this regard, the distinction between Hill's situation and Thompson's with regard to insubordination is nonsensical. If Thompson did not know he was being told to stay after the end of his shift, he should not have been disciplined at all. If Thompson did know he was being told stay past the end of his shift, the fact that he acquired this information from Hill, rather than by talking to Frey directly, would not make him any the less insubordinate.

Finally, Respondent did not automatically fire employees who ignored a supervisor's demand that they stay at work. This is further evidence that CBC's stated reasons for discharging Hill and Thompson are pretextual. Respondent gave Marcella Navarro a written warning on June 8, 2001 after she defied her supervisor's insistence that she stay at work past 10 p.m. (R. Exh. 19). Similarly, CBC suspended Julian Salaz for 3 days in April 2002, after he stopped work before the end of his shift. Salaz's infraction was his third within a 6-month period (GC Exh. 38, p. 800).

The January 20, 2003 Discharge of Tyrone Holly

Tyrone Holly worked for CBC from June 1, 1993 until his discharge on January 21, 2003. He openly supported the Union and distributed union literature in front of the plant. In the spring of 2002, Gary Birkemeyer, the CBC Packaging Manager, called Holly into the office and told him that Birkemeyer had heard that Holly was harassing employees about the Union all the time and that Holly was not to talk about the Union on company time.[39]

Also in the spring of 2002, Diane Tate, one of his supervisors, told Holly that a Union wouldn't help employees and couldn't change anything at the plant. She told Holly that companies that did business with CBC would stop doing so if Respondent's employees selected a union as their bargaining representative.

In the same timeframe, another CBC supervisor, Margie Brown, initiated a conversation with Holly while they were both working. Brown asked Holly why he favored having a union at the plant. Brown also told Holly that, "the people that they get their orders from, that they would take their business elsewhere because the Union is known to strike" (Tr. 1147, 1614). As discussed on pages 39–40, I find that Tate and Brown violated Section 8(a)(1) in their discussions with Holly.

On Saturday, January 18, 2003, Holly worked as a relief machine operator on two production lines, one of which was supervised by Diane Tate and the other by Jan Brandt. The shift was a 6-hour shift, which began at 5 a.m. and ended at 11 a.m.. Holly wore a shirt with buttons to work on January 18, which was contrary to a CBC policy, which forbid the wearing of shirts with buttons in the production areas. This policy was instituted pursuant to an incident in which a consumer had choked on a button, which had fallen into one of CBC's products. Holly had some uniform shirts with snaps at home but they were apparently dirty.

Tate saw Holly at approximately 7 or 7:30 a.m.; she noticed the shirt with buttons and told Holly he could not wear it. Holly asked Tate if he could go home. Tate told him that he could not go home, that she needed him to relieve the machine operators on her line (Tr. 584).[40]

Later that morning, Tate saw Holly on her line again wearing the same shirt with buttons.[41] Tate obtained a used short-sleeved shirt with snaps and gave it to Holly. Later, she saw Holly a third time with the short-sleeved snap shirt over the button shirt, which left the buttons on the sleeves of his shirt exposed. After Holly left her line to go to Brandt's line, Tate paged Holly and told him "to remove the button shirt or he could be wrote [sic] up." (Jt. Exh. 3, p. 385). Tate never threatened Holly with discharge or suggested that he might be fired if he didn't comply. When Tate saw Holly the fourth time[42] that morning he had complied with her instructions and was wearing a long-sleeved snap shirt in compliance with CBC policy.

[38] Among the employees who received at least three disciplinary actions within a 12-month period and who were not fired on the third offense are the following: Constance Yates, R. Exh. 3; Anthony Syeh, GC Exh. 14; Donald Whitted, GC Exh. 32; Gordon Purvis, GC Exh. 33; Sonny Henderson, GC Exh. 34; Jerry McClease, GC Exh. 33; Evelio Meijas, GC Exh. 36; Julian Salaz, GC Exh. 38; Marvin Hinton, GC Exh. 44; Kim Combs-Mason, GC Exh. 45; Karen Mohr, GC Exh. 46; and Doren Frantom, GC Exh. 47. Some of these individuals' records will be discussed in more detail in analyzing the termination of union supporter Patti Wickman on January 21, 2003.

[39] Neither Birkemeyer nor Dennis Herod, a supervisor, whom Holly said was present, contradicted Holly's testimony about this conversation.

[40] I credit Holly's testimony at Tr. 1160, that he did not ask to leave in a kidding or joking manner, over that at Tate's at Tr. 586. There is no reason for Holly to joke about wanting to leave when Tate was informing him that he could not work with a button shirt at a time when he didn't have a button shirt with him. As Tate concedes that she told him he couldn't leave, I find that Tate insisted that he stay at work.

[41] Tate testified she saw Holly the second time at 8:30 a.m.; Holly testified it was about 10 a.m., only an hour before the shift ended.

[42] Tate testified this occurred about 10:30 a.m.

On Monday morning, January 20, 2003, Holly was summoned to Gary Birkemeyer's office. Birkemeyer gave Holly his termination notice. Birkemeyer, Plant Manager Dennis Babb and Human Resources Manager Jack Johnson and/or other management officials made this decision without talking to Holly first. Johnson and CBC President James Appold met with Holly a week after his termination. After that meeting, Appold effectively ratified the decision to terminate Holly. Diane Tate neither recommended Holly's termination nor played any material role in the decision to fire Holly.[43]

Respondent Violated the Act in Discharging Tyrone Holly

As with the other discriminatees, the only real issue with regard to Tyrone Holly's termination is whether Respondent would have fired him but for his union activity. Respondent was clearly aware that Holly was a union supporter. The fact that Respondent summarily discharged Holly without talking to him first is a strong indication of antiunion animus and discriminatory motive. Moreover, the obvious pretextual reason CBC gives for the discharge also leads me to infer that his discharge was motivated by animus towards his union activities.

However, in addition, Holly was clearly not insubordinate. He may have been slow to comply with Tate's directions but her never defied her. In fact, when Tate pressed the issue by threatening Holly with a write up unless he took off the button shirt, he did exactly what Tate asked him to do.

I also find disparate treatment of Holly compared to Marvin Hinton, an employee for whom there is no record of union activity. Hinton was sent home and received a verbal warning on January 28, 2003, for reporting to work on that date in street clothes, rather than a CBC uniform. Hinton was told he had to report for work with a company uniform the previous week (GC Exh. 44, p. 1648). This was the eighth disciplinary action taken against Hinton within a 12-month period. The next day Respondent fired Hinton for getting into a fight with a fellow employee.

Respondent on many occasions punished insubordination with less than termination. In addition to the case of Marcella Navarro (R. Exh. 19), this is established by the following:

A 3-day suspension was given to Jorge Roman on August 2, 2001 (R Exh. 15). When his line lead told Roman to move to another position on her line, he responded, "No way, I'm not going to fucking do that."

Similarly, Aldo Magallanes was given a verbal warning for insubordination on July 23, 2002 and another on August 29, 2002 because he had been told three times during the same week to wear a beard guard (GC Exh. 6, p. 1270). On March 1, 2002, Joe Upshaw was counseled for insubordination when he failed to comply with his supervisor's direction to clean his Peters machine (GC Exh. 8, p. 1168).

On December 7, 2001, Respondent gave David Rose a written warning after he refused to train non-English speaking employees and left work early (GC Exh. 24). On May 1, 2002, Karen Dible received a verbal warning after she refused to clean the underside of the packing tubes on line 6 three separate times (GC Exh. 25).

On April 5, 2001, CBC suspended Sonny Henderson for three days after he refused to shovel product. He responded to his supervisor, "Are you retarded? That's not my job." When told to shovel the product a second time, Henderson replied, "I'm not doing it, it's not my job." (GC Exh. 34, p. 1395–1396).

Evelio Meijas was suspended for one day on June 4, 2002, after he argued with a line supervisor and shook his finger in her face (GC Exh. 36, p. 1550). Antonio Hernandez received a 2-day suspension after leaving work without following his supervisor's instructions in December 2001 (GC Exh. 37, p. 1219).

Respondent gave Ron Lance a written warning on October 29, 2002, after he cursed out his supervisor (GC Exh. 40, p. 906). Similarly, Marvin Hinton received a written warning for speaking to a supervisor in a very disrespectful manner on September 26, 2002 (GC Exh. 44, p. 1654–1657). A month and a half later, Hinton received a verbal warning for not wearing a hairnet in the production area, a transgression at least as serious as Holly's. Between these two warnings, Hinton had been suspended for one day for sexual harassment of a male employee that involved physical contact (GC Exh. 44, pp. 1649, 1650–1653).

Another violation of Respondent's rules comparable to that of Holly was Karen Mohr's failure to immediately remove jewelry when told to do so in August 1998. Mohr wasn't fired, she was given a written warning (GC Exh. 46, pp. 1096–1097). In Holly's case by contrast, Respondent fired Holly without any evidence of defiant conduct on his part. Additionally, Respondent did not give any consideration to any lesser form of discipline, which is an indication that Holly's lack of haste in complying with Tate's directions to remove his button shirt is a pretextual reason for his termination; the real reason was CBC's desire to fire enough union supporters to intimidate those who wished to continue the organizing effort.

Patti Wickman

Respondent hired Patti Wickman on August 21, 2000. She initially worked as a skid loader on the third shift, 10 p.m. to 6 a.m. Wickman is a type 1 (juvenile onset) diabetic. Respondent became aware that her condition at times caused her to become very emotional, confrontational, and would at times give her the appearance of being intoxicated (Jt. Exh. 4, p. 783). Although it is not clear whether her diabetes was the cause, Wickman on several occasions had emotional outbursts at work.

On May 20, 2001, Respondent apparently required Wickman to leave work and go to a hospital and then assessed attendance points for her leaving early (Jt. Exh. 4, p. 467). Wickman told Human Resources Manager Jack Johnson that she felt the assessment of attendance points was unfair because she would have had her condition under control in a few minutes.[44] Re-

[43] For the reasons set forth in fn. 34, I disregard the parties' stipulation at Tr. 12 that Diane Tate, along with Birkemeyer, Babb, and Johnson made the decision to fire Holly.

[44] I assume Wickman experienced a low blood sugar episode, which is very common for a type 1 (juvenile onset) diabetic (much more so than for type 2 diabetes, a different disease). Type 1 diabetics regularly

spondent refused to remove any of Wickman's attendance violations (id., p. 466). Wickman filed a complaint with the Ohio Civil Rights Commission alleging that CBC denied her a reasonable accommodation for her diabetes. Respondent settled this matter by agreeing to remove from Wickman's attendance record any points awarded for absences on April 12, May 20, and June 18, 2001 (id. pp. 481–482.

Other than attendance issues, Wickman's work record at CBC appears to have been a generally good one according to the performance review forms in her personnel file. She was, however, suspended for 3 days on July 11, 2001 for insubordination, after she started screaming, crying, and cursing when talking to her supervisor, Carol Nichols (Jt. Exh. 4, p. 774). At the same time Dan Kear, the third-shift manager, at the suggestion of Plant Manager Dennis Babb, moved Wickman to a packer position because she couldn't handle the stress of loading skids (Jt. Exh. 4, pp. 776 and 777).

In the 18 months between July 11, 2001 and January 16, 2002, CBC issued only one disciplinary notice to Wickman. On June 1, 2002, Wickman received a verbal warning for taking far too much time to clean two Peters machines (Jt. Exh. 4, p. 461).

Wickman openly supported the Union by distributing literature in front of the plant on several occasions before the election and on at least one occasion after the election. She placed union signs in the windows of her truck, which she parked in CBC's employee parking lot. Wickman also wrote BCTGM in magic marker on both biceps a few nights before the election. Third-Shift Manager Dan Kear required Wickman to wash the tattoos off. He concedes that he did so because of the tattoo urged support for the Union, not because CBC rules prohibited an employee in Wickman's position from wearing tattoos made with a magic marker. Kear testified that he also made an antiunion employee, Kim Combs-Mason to cover up an antiunion T-shirt.

During the week of January 12–18, 2003 Wickman was back loading skids, the job from which she had been removed in July 2001. On January 16, Packaging Supervisor Carol Nichols noticed that Wickman could not do this job when the production line speeded up. Wickman started screaming, cussing and crying. Nichols called the Dan Kear, who is in charge of the third shift, and Kear told Nichols to take Wickman off the skid loader job and put her on the production line. Nichols did so (Jt. Exh. 4, p. 775, Tr. 1637).

Nichols testified that, "if it [the production line] was going a normal slow pace she did fine but if she had to pick up speed, she just could not do it. . . ." (Tr. 1637–1638.) Respondent did not issue Wickman a disciplinary notice on account of the events of January 16. I draw this conclusion from Nichols' evasive testimony at Tr. 1641, 1647, and from the fact that the termination notice given to Wickman on January 21, 2003 doesn't mention the events of January 16 (GC Exh. 54).[45] Moreover, when Respondent's supervisors give employees a verbal warning that is to be taken into consideration in CBC's progressive discipline system, they most often do so on a counseling form, such as the one Wickman received on June 1. 2002 (Jt. Exh. 4, p. 461).[46]

On the third shift, January 19–20, 2003, Wickman was loading skids when her leadperson, Theresa Shartzer approached her about 3 a.m. Shartzer asked Wickman if she had called three Hispanic employees, who were working 10–15 feet away "Fucking Bitches." Wickman denied doing so.

At about 4:45 a.m. Wickman was summoned to the office of Third-Shift Manager Dan Kear. Kear asked Wickman if she had called the Hispanic employees "Fucking Bitches" and she again denied it (Tr. 507). Kear told her that she had been warned about this before and Wickman replied, "but I didn't do it this time." Kear then told Wickman she was being suspended. On the afternoon of January 20, 2003, Wickman spoke to Human Resources Director Jack Johnson on the telephone. He informed Wickman that she was being terminated.

Respondent Violated Section 8(a)(3) and (1) in Terminating the Employment of Patti Wickman

As with respect to the other discriminatees, the General Counsel has established Respondent's awareness of Patti Wickman's activities in support of the Union and its extreme hostility to all such activity. From this evidence alone, I would infer that a substantial motivating factor in Wickman's discharge was her union activity. However, the obvious pretextual nature of the reason advanced for Wickman's discharge makes the General Counsel's case much more compelling.

Wickman's termination form demonstrates that she was terminated pursuant to Section B-20 of Respondent's employee handbook (Jt. Exh. 8, p. 41, 20), "Using inappropriate (e.g., abusive, discriminating, or obscene language or gestures); making or distributing inappropriate (e.g., abusive, discriminating, or obscene) writing, drawings, literature, etc." (GC Exh. 54, Jt. Exh. 4, p. 451).

The preamble to section B-20 states that any violation of the offenses listed below will result in a verbal warning, a written warning or suspension depending on the circumstances surrounding the offense. . . . Any employee who receives three warnings in any 12-month period may be discharged. Wickman did not have three warnings within the 12-month period prior to January 16, 19, or 21, 2003.[47]

correct low blood sugar episodes quickly by ingesting glucose tablets, juice, or another form of sugar.

[45] The reverse side of Wickman's termination notice is missing from her personnel file (Jt. Exh. 4).

[46] I also discredit Theresa Shartzer's testimony that she gave Wickman a verbal warning for cursing at tow motor operator about a month before Wickman's termination. There is no such verbal warning in Wickman's file. Moreover, Shartzer's testimony regarding this incident is hearsay. She allegedly was informed of the incident by Betty Gerren, who at the time of trial was still a CBC supervisor, but who did not testify. I find there is no credible evidence that the incident occurred. Moreover, assuming the incident happened, there is no evidence that Respondent in any way relied on it in terminating Wickman.

[47] Respondent has not established that it ever fired an employee for profane or obscene language apart from its progressive discipline policy. There are four employees for whom termination notices are included in R Exh. 9. One, Constance Yates, was fired on the fourth offense within a year. Similarly, Matt Rieman was suspended several weeks before his discharge. There is no evidence as to his disciplinary record before that—although the termination notice suggests that Rie-

The fact that Respondent ignored the provisions of its employee handbook and failed to follow its progressive discipline policy in terminating Wickman is a significant factor in my conclusion that the reason it gives for Wickman's termination is pretextual and that she would not have been terminated in the absence of her union activities, *e.g., Pro-Spec Painting, Inc.*, 339 NLRB 946, 951 (2003). CBC simply had no basis for discharging Wickman for her conduct on January 19–20, even assuming that it had a reasonable belief that she committed the transgression with which she was accused. Finally, Respondent's willingness to rely on pretextual reasons to cover up its discriminatory discharge of any one of the seven alleged discriminatees convinces me that it was very likely to do so with regard to others—in the absence of a convincing nondiscriminatory explanation for it actions.

Respondent has made no serious effort to prove a nondiscriminatory basis for discharging Wickman. Even if one were to accept its concocted explanation that she received three warnings within a year, it has failed to explain why Wickman deserved termination. Respondent concedes that termination is not automatic upon a third warning and the record is full of instances in which employees were not terminated upon their third warning within a year. For example, there is no nondiscriminatory explanation for terminating Wickman and not terminating Marvin Hinton upon his third discipline on November 9, 2002; his fourth discipline on January 25, 2003 [for ruining six full skids of product and then falsifying his lab report] or for not terminating antiunion employee Donald Whitted after he received his third disciplinary measure within two and a half months (GC Exh. 32).

Respondent introduced a list of employees known to have been terminated between January 2000 and January 2003 for having three warnings within a 12-month period. The list contains eight names (R. Exh. 20). In fact, all eight employees were terminated pursuant to section A-21 of Respondent's handbook, which makes termination automatic if an employee is denied a raise three times within a rolling 12-month period. Thus, the termination of these employees is in no way comparable to Wickman's termination and in no way indicates that her discharge was nondiscriminatory.

Finally, there is no reliable evidence that Wickman called three Hispanic employees "Fucking Bitches." All the evidence in this record that she did so is hearsay and not even second-hand hearsay at that. Given this fact I find Respondent may not even have reasonably believed that Wickman called these employees these names.

Theresa Shartzer, Wickman's lead, testified that another CBC lead, who she believes was Bertha Noriega, came to her and told her that an unnamed Hispanic person came to Noriega and told Noriega that Wickman cursed at "them." Shartzer could not name the employees who were allegedly cursed at (Tr. 526). According to Shartzer, Noriega told her that she was approached by the employees on box-off. Shartzer reported this information to Dan Kear. Noriega did not testify.

Kear testified that he and Chris Sherrick, the packaging manager, called three Hispanic employees into his office with Bertha Noriega, who acted as interpreter, and Esmerelda Alafa, who worked for A+, the temporary employment agency for whom the three worked. According to Kear, one spoke some broken English, the two others spoke "minimal" English. Theresa Shartzer, on the other hand, testified that when she tried to speak to these employees in English, "They didn't really comprehend what I was saying" (Tr. 532).

Kear testified that he interviewed the three employees together, through Bertha Noriega. Kear does not speak or understand Spanish. Kear also testified he heard the three say "fucking bitches." However, he did not understand anything else in the conversation. He was unable to testify as to which two of three employees had the alleged remark directed to them, and which one merely overhead it. Finally, Kear testified that the employees said in the interview that they complained to Theresa Shartzer. This is incorrect (Tr. 502–503, 526, 531). As Kear's account of his meeting with the employees in inaccurate in this regard, I have no reason to believe that any other parts of his testimony are more accurate.

Since there is no evidence as to whether or not Noriega still works for CBC or whether the three Hispanic employees work at the McComb plant, I draw no adverse inference from Respondent's failure to call them as witnesses. However, Respondent has relied solely on hearsay evidence to establish that Wickman called two of these employees "fucking bitches" and to establish that it had a reasonable belief that she did so. Due to this fact, I decline to find either that the incident occurred or that CBC had a reasonable belief that it did occur when it fired Wickman.

The 8(a)(1) Allegations (Complaint Paragraph 6)

Tyrone Holly testified that just before Easter in 2002, he was summoned into Gary Birkemeyer's office. Birkemeyer, in the presence of Supervisor Dennis Herod, told Holly that he was not supposed to talk about the Union on Company time and that employees were complaining that Holly was harassing them about the Union (Tr. 1144–1145). Birkemeyer did not contradict Holly's testimony and I therefore credit Holly.

Moreover, I note that Holly's testimony is consistent with that of Second-Shift Area Manager Donald Hager. Hager testified that he was told by his supervisor, Douglas Benjamin, that union employees would be allowed to campaign in the break rooms, rest rooms and outside, off company property (Tr. 667). Thus, implicitly, Hager was told that employees could not advocate the union's cause in any other places on Respondent's premises.

While an employer may prohibit the discussion of non work-related topics during working time, it cannot limit such a prohibition to unions or other protected subjects, *Willamette Industries*, 306 NLRB 1010, 1017 (1992); *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986); *Altorfer Machinery Co.*, 332 NLRB 130, 133 (2000); *Jensen Enterprises*, 339 NLRB 877 (2003). Respondent allowed employees to discuss a variety of non

man had been counseled for his behavior on many previous occasions. Similarly, there is no evidence as to the prior disciplinary record of Jack Marquart. Marquart was fired for a racial slur, an offense not comparable to Wickman's alleged conduct. Finally, Karen Layton was fired for conduct properly classified as sexual harassment, an offense not subject to the progressive disciplinary policy.

work-related topics. Moreover, its supervisors on a number of occasions discussed the union campaign with rank and file employees during worktime.[48]

Finally, Packaging Manager Gary Birkemeyer testified that employees were allowed to discuss the Union in work areas on work time unless somebody complained. This record establishes that on several occasions Respondent warned prounion employees to stop discussing the Union on Company time solely on the basis of supervisor's complaints. Even had CBC received complaints from rank and file employees, the fact that an employee may not want to hear a solicitation or repeated solicitations on behalf of the Union does not negate its protected status. This is so even if the employee subjectively considers such appeals to be "harassment," *Nichols County Health Care Center*, 331 NLRB 970, 981 (2000).[49]

I thus find the 8(a)(1) violation alleged in Complaint paragraph 6.

Complaint Paragraph 7

As stated at page 3, footnote 5 of this decision, I dismiss the allegation that Respondent, through Supervisor Herb Telford, told Russ Teegardin that he could not discuss the Union during break times because I cannot resolve their conflicting testimony.

Complaint Paragraph 8

Tyrone Holly testified that in April or May 2002, Packaging Supervisor Diane Tate told him that a union couldn't change anything at CBC and the firms doing business with Respondent would not do so anymore. As his testimony in this regard is uncontradicted, I credit it. Respondent, by Tate, violated Section 8(a)(1) in conveying to Holly that it would be futile to support the Union, *Albert Einstein Medical Center*, 316 NLRB 1040 (1995).

Respondent argues that Tate's comments are protected by Section 8(c) of the Act. I conclude otherwise. There is nothing to indicate that her "prediction" was "carefully phrased on the basis of objective fact." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). I therefore find that it was outside the bounds of Section 8(c), coercive and violative of Section 8(a)(1).

Complaint Paragraph 9

Holly also testified that he had a conversation in May or June 2002 with Supervisor Margie Brown. He testified that Brown told him that if employees selected the Union that Jim Appold would close the doors of the plant, that employees would lose their benefits and that companies doing business with CBC would cease to do so. Brown denied telling Holly that if the Union was voted in the company would close up shop. She also denied that she told Holly that employees would lose all of their benefits. In light of Brown's testimony, I decline to credit Holly in so far as Brown contradicted his testimony.

However, Brown did not address Holly's testimony that she told him that, "the people that they get their orders from, that they would take their business elsewhere because the Union is known to strike" (Tr. 1147, 1614). I therefore credit Holly's testimony in this regard and find that through Margie Brown Respondent violated Section 8(a)(1) by suggesting to Holly that his support for the Union was an exercise in futility. An unsupported employer prediction that a strike and then a plant shutdown or loss of business will follow a union victory are unlawfully coercive, *Federated Logistics and Operations*, 340 NLRB 255, 256 (2003); *AP Automotive Systems*, 333 NLRB 581 (2001); *Unitec Industries*, 180 NLRB 51, 52–53 (1969).

Complaint Paragraph 10

The Union and its supporters first distributed literature in front of the CBC plant at about 10 p.m. on May 21, 2002. Some of the representatives and employees were wearing union baseball caps. Shortly thereafter, during the changeover between the second and third shifts, a McComb police car pulled up in front of the plant. The police officer went into the plant and came out 15–20 minutes later. He then told the union supporters and representatives that they were violating Respondent's no solicitation rule and would have to leave. Union Representative Wayne Purvis explained to the policeman that he and the employees were trying to organize CBC, rather than engaging in any commercial activity.

The policeman then went back inside the plant and apparently spoke to Second-Shift Manager Douglas Benjamin. When he returned the officer told the union representatives and employees that they could continue their activities but to stay out of the street. The security guard who had summoned the police told Benjamin that CBC's Security Chief Marc Wurgess had instructed him to call the police if he observed any union activity (Tr. 679–680). Wurgess testified that he did not tell his staff to call the police in the event of union activity:

> I told my staff, as indicated in the memo, if there was a problem with trespassers then Macomb [sic] PD would be the appropriate people to call, or if there was any type of incident or safety matter of—of any concern out on the street that would effect the health and welfare of any people out there, then they should call the police, but not for union activity, absolutely not.

Tr. 735.

I credit Benjamin's testimony and discredit that of Wurgess. First of all, to rebut the guard's admission to Benjamin, Respondent should have done more than offer the self-serving testimony of Wurgess. It did not, for example, call any of his subordinates to corroborate his testimony. Moreover, nothing occurred outside the plant on May 21, other than union activity, that would have led a guard to call the police if he was following Wurgess' instructions. There was no "incident or safety matter" other than people wearing union caps congregating across the street from the plant.

I conclude that Wurgess had in fact told his guards to call the McComb police at the first sign of union activity, which Respondent had been expecting for over 2 months. In doing so, Wurgess, as an agent of CBC, violated Section 8(a)(1). Re-

[48] See, for example, the testimony of Tammy Medina and James Keller.

[49] When Tammy Medina complained about an employee and a supervisor discussing the antiunion perspective, her supervisor suggested that she look for another job.

spondent argues that this allegation should be dismissed because there is no evidence that the police visit had any adverse effect on the organizing campaign. Employees' subjective reaction to this event is irrelevant. An employer violates Section 8(a)(1) by conduct that would reasonably tend to interfere with, restrain or coerce employees in the exercise of their section 7 rights, regardless of whether employees are in fact intimidated, *Helena Laboratories Corp.*, 228 NLRB, 294, 295 (1977); *Palagonia Bakery Co.*, 339 NLRB 515 (2003).

Complaint Paragraph 11

On May 20, 2002, Third-Shift Manager Dan Kear told employee Sherri Todd that there was a possibility that she would he given a position as a fill-in leadperson to cover for individuals going on vacation. The next evening, May 21, 2002, Dan Kear observed union representatives and supporters in front of the plant. He recognized Sherri Todd as one of the employees distributing union literature and/or authorization cards. The next day, Kear and Packaging Manager Chris Sherrick summoned Todd to Kear's office. During their conversation, Kear told Todd that she would not be given the job of a temporary lead as a result of her union activity the night before (Tr. 486).

A temporary or fill-in lead is not a supervisory position. Temporary or fill-in leadpersons were eligible to vote in the representation election (Tr. 1546–1548). In denying Todd the position of fill-in lead on the grounds of her union activity, Respondent violated Section 8(a)(3) and (1) of the Act. Apart from the discrimination, Kear's statement to Todd was coercive and violated Section 8(a)(1).

Complaint Paragraph 12

On May 23, Respondent erected four signs outside its plant which read "Notice All Activities Monitored by Video Camera" and ten signs which read, "No Trespassing, Property of Consolidated Biscuit Company, Violators will be prosecuted." (Jt. Exh. 11). One was erected at the main entrance to the employee parking lot, the area in which union supporters had congregated beginning on the evening of May 21.

The areas in which the video signs were erected had been under surveillance by video cameras at the guard station inside the plant prior to May 2001. The only change in May 2002 was the erection of the signs. The signs, which were personally approved by CBC Vice President John Appold, were ordered on March 25, 2002 and received at CBC on April 3. CBC Security Chief Mark Wurgess put in a work order to have the signs erected on April 10. The signs were erected on March 22 and 23.

The General Counsel contends the signs were erected to coerce employees in the exercise of their Section 7 rights—by insuring that they knew their union activities were being watched. Respondent argues that it is just coincidence that the signs were erected at the outset of open organizing efforts. Despite the fact that there was no union activity in front of the plant until May 21, Respondent's management had been aware that some employees were trying to bring a union into the plant as early as February (Tr. 1282).

Were it not for the extreme hostility of CBC management towards unionization and the supporters of the Union, I might consider Respondent's contention of mere coincidence. However, given the degree of animus emanating from the President's office downward, I infer instead that Respondent ordered the signs after getting wind of an organizing campaign and timed their placement in order to achieve the maximum coercive effect. However, in determining whether the appearance of the signs violated Section 8(a)(1) it is not necessary for the General Counsel to establish a coercive intent on the part of Respondent, only that the placement of the signs immediately following the commencement of public organizing in front of the plant, would reasonably tend to restrain, coerce or interfere with employees Section 7 rights. I find that it did so and that Respondent violated Section 8(a)(1).

Complaint Paragraph 13

This allegation is based on Russell Teegardin's testimony that 1 day in the spring or summer of 2002, he had a discussion with a security guard named Keith regarding the interest of some of the guards in joining a union. Teegardin testified that he noticed a shadow, walked over and saw his supervisor Herb Telford standing about 10 feet away. Teegardin testified that Telford then turned and walked away (Tr. 971–974). Telford did not testify about this alleged incident. The General Counsel argues the Telford was either eavesdropping on the conversation or trying to give the impression that he was doing so. Without more evidence about this incident, such as to how long Telford was standing near Teegardin and the guard, I find that the General Counsel has not established a violation of Section 8(a)(1).

Complaint Paragraph 14

One day in the spring or summer of 2002, Susan Henry, a line supervisor on the first shift, saw Shirley Kelley, a CBC retiree, standing across the street from the plant, distributing union literature, at the changeover between first and second shift. Russell Teegardin was distributing literature with Kelley to employees leaving the first shift and those reporting for the second shift. Kelley greeted Henry, who responded, "are you telling these people that they could lose their Christmas bonus" (Tr. 1602). This threat of reprisal if employees selected the Union is an obvious violation of Section 8(a)(1).

Complaint Paragraph 15

Russell Teegardin testified that one night in early June 2002, he went into the mechanic's supervisor's office to get some tools at a time when the third shift mechanic's supervisor, James Keller, was holding a meeting with about five mechanics. Teegardin testified that Keller was telling the mechanics that the Union was going to cause CBC to lose contracts with Nabisco and would make the company go bankrupt (Tr. 976). Teegardin also testified that on a regular basis during June 2002, Keller would enter the production area and yell that the Union would cause the plant to close and/or lose contracts.

Respondent called Keller as a witness who responded to a number of leading questions in a manner suggesting that Teegardin's testimony was false (Tr. 1579–1580). Due to the leading nature of the questions posed, I credit Teegardin and find that Respondent, by James Keller, threatened employees with loss of employment and therefore violated Section

8(a)(1).[50] For example, Respondent did not ask Keller whether he ever saw Teegardin while he was addressing his mechanics and if so, what he recalled he was talking about at the time and what he said. The nature of the questions posed allowed Keller to avoid addressing Teegardin's testimony directly.

Complaint Paragraph 16

In July 2002, Yolanda Manns, a leadperson and statutory supervisor, was in charge of the production line on which Tyrone Holly was working. She initiated a conversation with Holly while they both were working. Manns told Holly that her husband worked for a unionized employer and that conditions were not that good at her husband's place of employment. During this 10–15 minute conversation, Manns told Holly that the Union could not improve conditions at CBC and just wanted the employees' money.

On the basis of Holly's uncontradicted testimony, I find that Respondent, through Yolanda Manns, violated Section 8(a)(1) in suggesting to Holly that it was futile to support the Union.

Complaint Paragraph 17

On June 7, 2002, supervisor Betty Gerren encountered three employees in the breakroom who were discussing the Union. She told them that they'd better watch what they were doing. Gerren also said "they're going to get tougher on you. If you get a Union in here, they'll be watching you." (Tr. 878). Regardless of the friendly intent of these remarks, they constituted a threat of stricter discipline and thus violated Section 8(a)(1), *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975); *Trover, Inc.*, 280 NLRB 6 fn. 1 (1986).

Complaint Paragraph 18

The General Counsel alleges that on June 3, 13, and 27, 2002, Respondent by Second Shift Manager Douglas Benjamin engaged in coercive observation of union activity. The complaint also alleges such a violation on the part of Donald Hager. I assume that the General Counsel is alleging unlawful surveillance of employees' union activities.

These allegations are predicated on the testimony of Thomas Thompson, who observed Benjamin taking an extended smoking break across the street from employees who were engaging in union activity on two occasions. On one of those occasions Hager came out to join Benjamin for a few minutes. Benjamin testified without contradiction that it had been his longstanding practice to take his smoking break in front of the facility.

> The idea behind finding, "an impression of surveillance" as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways . . . an employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement.

Flexsteel Industries, 311 NLRB 257 (1993).

Nevertheless, it is not a violation of the Act for an employer to merely observe open union activity, *Fred'k Wallace & Son*, 331 NLRB 914 (2000). The General Counsel has not established that either Benjamin or Hager did more than observe open union activity on the evenings in question. Therefore, I dismiss complaint paragraph 18.

Complaint Paragraph 19

On or about June 14, 2002, Cathy Hill was distributing union literature on the sidewalk in front of the CBC plant, about 20-25 feet from the employee entrance, prior to the start of her shift. A company security guard came out of the building and told Hill that she was not allowed to distribute material on CBC property. Approximately 1 month later, Respondent's Security Chief issued a memo to his guards informing them that union representatives who were not CBC employees were not allowed on CBC property, but that prounion CBC employees were allowed to engage in union activity on company property outside the plant. No similar instructions, written or verbal, were given to the security guards prior to the July memo (GC Exh. 48). Thus, I credit Hill's testimony in part because it is consistent with the instructions the security guards had received prior to the July memo. Therefore, I conclude that CBC through its security guard violated Section 8(a)(1) in enforcing Respondent's solicitation/ distribution rule in an unlawful manner on this one occasion.

An employer's rule which denies access to off-duty employees [and inferentially their right to distribute literature] is valid only if 1) it limits access solely with respect to the interior of the plant and other working areas; 2) is clearly disseminated to all employees; and 3) applies to off-duty employees for any purpose and not just to those employees engaging in union activity. "Except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates and other outside nonworking areas will be found invalid." *Tri County Medical Center*, 222 NLRB 1089 (1976).

Complaint Paragraph 20

On July 25, 2002, Union Representative Bill Hilliard was across the street from the CBC facility handing out union literature around 2 p.m., about the time between the changeover between first and second shifts. Lori Herod, a first shift leadperson and statutory supervisor, pulled up in her van and parked a few feet away from Hilliard. He walked over and attempted to give Lori Herod union literature. She raised her voice and told Hilliard she didn't want the union literature.[51]

Hilliard went back to where he was standing and had an employee take a photograph of him in a location in which the Herod's license plate would appear in the picture. Later, Dennis Herod, Lori's husband, who is also a CBC first shift supervisor, came out of the plant. Dennis Herod implicitly accused

[50] Unlike the employer in *Curwood, Inc.*, 339 NLRB 1137 (2003), Keller had no objective basis for making these threats or "predictions."

[51] Hilliard testified that Herod cursed at him and was yelling to employees coming out of the facility that they should not take union handbills. I decline to credit his testimony due to the conflicts in the testimony of Hilliard, Karen Smith, a witness called by the General Counsel, Beth Beard, a witness called by Respondent and Dennis Herod. Lori Herod, who no longer works for Respondent, did not testify.

the Union of vandalizing his car. Lori Herod accused the Union of making threatening phone calls to their home.

Packaging Manager Gary Birkemeyer came out of the plant and told the Herods to leave. As they started to leave, Hilliard was talking to Birkemeyer. Lori Herod then got out of the van and yelled to Birkemeyer that Hilliard was a liar. Birkemeyer then told the Herods again to leave and they did so. I find that the General Counsel had not established a violation of Section 8(a)(1) with regard to this incident.

Complaint Paragraph 21

On about August 1, 2002, CBC supervisors Lori and Dennis Herod came back to Thomas Thompson's work area after one of the conveyors in the palletizer system jammed. Dennis Herod initiated a discussion with Thompson about the Union. He asked why Thompson was so much in favor of the BCTGM. Thompson complained about CBC management and particularly the lack of increases in employees' pensions. Herod then said that if employees chose to be represented by the Union, CBC President Jim Appold might start moving production lines out of the McComb plant to other CBC facilities (Tr. 1109–1110). Respondent, by Dennis Herod, violated Section 8(a)(1) in threatening/predicting that some employees would lose their jobs if they selected the Union—without any objective basis for doing so.[52]

Complaint Paragraph 22

Respondent conducted seven or eight meetings for its employees 2 to 3 days before the election. All, or virtually all, CBC employees attended at least one of these meetings. CBC President James Appold spoke at each of these meetings and Vice President Larry Ivan ran a slide projector. Appold told the employees that the amount of vandalism that had occurred at the plant during the union campaign was out of the ordinary. He suggested that vandalism comes with unions. Appold also told employees:

> When you begin to bargain you start from zero, you don't start where you're at and bargain. Forward, from that point you start with a clean slate. (Tr. 1877).

Tyrone Holly testified about the meeting he attended. Holly said that Appold blamed the vandalism that occurred, such as dented cars, cars scraped with keys and damaged propane tanks on the Union. I credit Holly that Appold meant to suggest the BCTGM supporters were responsible for the vandalism. I also find that is what a reasonable person would glean from Appold's remarks.

Holly testified that Respondent showed a slide of union supporters holding signs outside the plant and that Appold said that if these people didn't like it at CBC, they could find work elsewhere. Holly also testified that Appold indicated that many of these employees wouldn't be working at CBC much longer anyway. Ivan contradicts this testimony. In view of Ivan's testimony, I do not credit Holly's testimony in this regard because if Appold had said something so significant at a meeting with employees, I would expect to hear testimony to this effect from more than one witness.

However, Holly also testified about Appold comments regarding bargaining:

> That it's a give and take situation. That he ain't going to just give something and just give it away. Like he said that we got the turkeys, the hams, and our cookie box, and if the Union comes in there, a lot of that stuff we won't even have because they put it all on the table.
>
> And he said that we won't get probably none of that after it's all over with.

Tr. 1155.

Holly's testimony about Appold's comments regarding the bargaining process were not directly contradicted by Ivan (Tr. 1877). I therefore credit it. Appold did not testify.

It is well established that employer statements to employees during an organizing campaign that bargaining will start from "zero" or from "scratch" are dangerous phrases which carry within them the seed of a threat that the employer will become punitively intransigent in the event that the union wins the election. Although such statements are not per se unlawful, the Board will examine them, in context, to determine whether they effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the Union can induce the employer to restore or—conversely—whether they indicate that any reduction in wages and benefits will occur only as a result of the normal give and take of collective bargaining, *Federated Logistics and Operations*, 340 NLRB 255 (2003); *Taylor-Dunn Mfg. Co.*, 252 NLRB 779, 800 (1980).

Appold's statements were of the type that would reasonably be understood as threats that benefits would be lost and that selecting union representation would be futile. His statement that bargaining would begin at zero must be considered with his suggestion that such benefits as holiday turkeys and hams would be lost. Although, Appold did say that bargaining was a "give and take situation," his comment that employees would probably lose specific benefits in the end negated the lawful aspects of his address.

Coupled with his implicit allegations against the Union and its supporters of vandalism [none of which have been established on this record] one could only conclude that CBC had no intention of engaging in good faith bargaining if the Union won the election. To the contrary, the message an employee would reasonably draw from Appold's remarks is that he was threat-

[52] Dennis Herod confirmed that he had a conversation with Thompson in the presence of his wife about the Union (Tr. 1819). Rather than asking Herod for a narrative about what union-related matters he discussed with Thompson, Respondent posed three leading questions to him. He was asked if he discussed the union campaign; Herod said he didn't recall although a minute earlier he conceded that he had discussed the Union. He also said he didn't recall telling Thompson that Appold might move lines out of the McComb facility to other CBC facilities. Finally, he categorically denied telling Thompson that Appold could always close the factory and move the whole facility down to Kentucky (Tr. 1820). Due to the leading nature of Respondent's inquiry and Herod's carefully crafted answers, I credit Thompson at least insofar as he testified that Herod suggested that Appold might move production lines out of the McComb facility if the employees selected the Union.

ening them with a loss of benefits and that selecting the Union would be futile. This is also consistent with the message conveyed by lower level supervisors through out the campaign, as well as the overt hostility demonstrated by CBC management towards the Union and its supporters. I therefore conclude that Respondent, through James Appold, violated Section 8(a)(1) when he told employees that bargaining would start at zero and suggested that employees would lose certain specific benefits they enjoyed without a Union.

Complaint Paragraphs 23, 24, 25, and 27

These paragraphs of the complaint are predicated on the testimony of Tammy Medina, a third shift machine operator who openly supported the Union. Medina testified that on about August 6, James Keller, the lead mechanic on the third shift, and Tanya Bretz, a rank and file employee, came over to her workstation. Bretz asked Medina some questions about the Union. Keller interrogated Medina as to why she thought the plant needed a Union. The conversation amongst the three continued for about 20 minutes.

Keller asked Medina if she was enrolled in the CBC 401(k) plan. When she replied in the negative, Keller said then she had no reason to complain. Medina testified that Keller then said the problem with the plant was that "everybody gets away with everything." She testified that he then said that if a machine operator called upon him for reasons he felt insufficient, Keller would write up the operator. Further Medina testified that Keller said, "we'll see what your big bad union will do you for then."

Keller did not expressly contradict Medina's testimony. However, in response to the questions from the Union's counsel, Keller testified that he did not tell Medina that he could write up anybody for anything regardless of whether or not the Union was voted in or not (Tr. 1586). I find that at least implicitly Keller's testimony contradicts Medina's testimony in all material respects. Since I have no basis for crediting one over the other, I dismiss the allegations in complaint paragraph 23.

Medina testified without contradiction that at the end of the shift she told supervisor Jared Davidson that she had enough of Keller and Bretz and that Respondent needed to tell Keller to back off. The next night Medina ask her lead, Mary Lou Tyson, to tell Keller and Tanya Bretz to leave her alone if they came over to harass her about the Union. Tyson responded that Keller and Bretz were merely expressing their opinion.

Medina responded by telling Tyson that she had a right to ask Tyson to tell Keller and Bretz to leave her alone. Tyson became angry and replied, "if you don't like your fucking job, the door swings both ways. Find another one." Given the fact that I have not found that Respondent, by Keller, violated Section 8(a)(1), I dismiss complaint paragraph 24. In the context of the conversation, I do not find that Tyson was threatening Medina with discharge in retaliation for her union activities. There is no evidence that supports a violation by Respondent predicated on the activities of Jared Davidson, Cindi Wilson and Mary Lou Tyson, who were alleged to have harassed Medina on account of her union activities in complaint paragraph 25.

I therefore dismiss this allegation as well.

On or about August 11, Medina was assigned to relieve seven machine operators. Other relief operators were assigned to relieve four to six operators. The General Counsel alleges that Medina was assigned more onerous working conditions to restrain, coerce and interfere with the exercise of her Section 7 rights. Gary Birkemeyer, Respondent's packaging manager, testified that Respondent's standard ratio of relief operators to machine operators is 1:7. However, this in no way contradicts Medina's testimony that she was assigned more operators to relieve than other relief operators on the evening of August 11. For example, Birkemeyer's testimony does not exclude the possibility that there were 17 machine operators on the third shift that night and that Medina was assigned to relieve seven and that the two other relief operators split the remaining 10.

I credit Medina's testimony with regard to her assignment on August 11. Respondent knew Medina was a union supporter and it harbored a tremendous amount of animus towards the Union and its supporters. Therefore, in the absence of testimony as to an alternative explanation, I find Medina was assigned to relieve more operators than other relief operators for reasons related to her union activity. I therefore find that Respondent violated Section 8(a)(1) by imposing more onerous working conditions on Medina to retaliate against her for her support for the Union.

Complaint Paragraph 26

As noted previously, Betty Gerren, one of William Lawhorn's supervisors, stopped at his house on August 10, 2002. Gerren told Lawhorn in the presence of other employees that if the Union didn't win the representation election, Lawhorn would be fired (Tr. 869, 879, 1290). Gerren, who is still a supervisor at CBC (Tr. 508), did not testify in this proceeding.

The fact that Gerren may have intended the remark as a friendly warning does not negate the fact that this was a threat that reasonably tended to interfere with the exercise of the Section 7 rights of all the employees present, *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975); *Trover, Inc.*, 280 NLRB 6 fn. 1 (1986).

Respondent suggests that this allegation should be dismissed because there is no evidence that any of the employees present reacted adversely to Gerren's comment. However, it is well settled that an employer violates Section 8(a)(1) by making statements that would reasonably tend to interfere with, restrain or coerce employees in the exercise of their section 7 rights, regardless of whether employees are in fact intimidated by the remarks, *Helena Laboratories Corp.*, 228 NLRB, 294, 295 (1977); *Palagonia Bakery Co.*, 339 NLRB 515 (2003).

Complaint Paragraphs 28(A) and (B)

On August 13, 2002, Third-Shift Manager Dan Kear required Patti Wickman to remove two magic marker messages from her arms that stated, "BCTGM vote yes." Respondent did not have a rule prohibiting employees from having tattoos or similar markings and did not require that they be covered (Tr. 510). Kear concedes he ordered Wickman to remove the markings on her arm because they concerned the union campaign. He testified that he was told to prohibit all literature or signs in the production area that were either prounion or antiunion. Similarly, Packaging Manager Gary Birkemeyer required Cathy

Hill to wash off a prounion permanent marker message from her forearm on or about the same date.

The General Counsel and Respondent disagree as to whether the messages written by Hill and Wickman on their arms constituted "tattoos." I conclude that whether or not they were "tattoos" is irrelevant to the issue of whether or not Respondent could insist on the removal of the markings. For analytical purposes, the magic marker messages were the equivalent to the wearing of union insignias.

Employees have a protected right to wear union insignia, *Holladay Park Hosp.*, 262 NLRB 278, 279 (1982). An employer may not lawfully restrict employees from wearing union insignia unless it demonstrates the existence of "special circumstances," such as where the display of such insignia could contaminate food products, *United Parcel Service*, 312 NLRB 596, 597 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994); *NLRB v. Autodie, Intern., Inc.*, 169 F.3d 378, 383 (6th Cir. 1999).

The legality of a prohibition against union insignias depends numerous factors, *Produce Warehouse of Coram*, 329 NLRB 915 (1999). In this case, CBC has not made the showing necessary to prohibit Wickman and Hill from displaying their magic marker messages, *Meijer, Inc. v. NLRB*, 130 F.3d 1209, 1215 (6th Cir. 1997).[53] These employees worked in the packaging department and there is no evidence that either came in contact with unpackaged food products—in fact, it is clear that Wickman did not do so.

Moreover, assuming Respondent could otherwise promulgate a rule prohibiting the displaying of magic marker messages, I find that the rule is illegal due its discriminatory motive, i.e., the fact that it was instituted just prior to the election and directed specifically to markings relating to protected activities, *Youville Health Care Center*, 326 NLRB 495 (1998); *State Chemical Co.*, 166 NLRB 455 (1967).

Respondent contends that it did not violate the Act because it also required antiunion employees to remove such items as antiunion T-shirts and placards from the production area. It is clear that CBC had no objection, for example, to a shirt or marking that was unrelated to the Union, such as a shirt with a sports team logo. CBC's policy is analogous to one that allows employees to discuss nonwork related topics but forbids the discussion of the union, pro or con. By limiting its prohibition to the display of messages pertaining to unionization, CBC has violated the Act, *Altorfer Machinery Co.*, 332 NLRB 130, 133 (2000); *M. J. Mechanical Services*, 324 NLRB 812 (1997).

Complaint Paragraph 29

Kelly Frey gave union supporter Thomas Thompson a verbal warning on August 21, 2002 for not being at his workstation on time. When giving Thompson this warning, Frey also brought up the fact that Thompson had missed work on August 16. Thompson told Frey he had overslept. They then argued about whether or not Thompson was required to call in. Frey told Thompson not to play games and remarked that his union was not around to protect him now.

Frey's remark would clearly tend to interfere with, restrain and coerce Thompson's continued exercise of his Section 7 rights. She was in effect in threatening him with stricter enforcement of Respondent's disciplinary rules. Her comment would tend to restrain Thompson from engaging in any further union activity. This is particularly true in light of the fact that Respondent fired the two most active union adherents, Lawhorn (5 days earlier) and Teegardin (5 days later), in the same timeframe. I therefore conclude that Respondent, by Frey, violated Section 8(a)(1).

SUMMARY OF CONCLUSIONS OF LAW

Respondent violated Section 8(a)(3) and (1) in:

1. Terminating the employment of William Lawhorn on August 16, 2002;
2. Terminating the employment of Russell Teegardin on August 26, 2002;
3. Terminating the employment of John Green on September 18, 2002;
4. Terminating the employment of Gary Hill on January 3, 2003;
5. Terminating the employment of Thomas Thompson on January 3, 2003;
6. Terminating the employment of Tyrone Holly on January 20, 2003; and
7. Terminating the employment of Patti Wickman on January 21, 2003.
8. Issuing a disciplinary warning to Russell Teegardin on June 22, 2002;
9. Issuing a written warning to Russell Teegardin on June 26, 2002;
10. Disqualifying Sherri Todd from the position of temporary or fill-in lead on May 21, 2002.

Respondent violated Section 8(a)(1) of the Act:

1. By Gary Birkemeyer, in the early spring of 2002, in telling Tyrone Holly not to talk about the Union on company time and telling Holly that he was harassing employees about the Union;
2. By Diane Tate, in April or May 2002, in suggesting to Tyrone Holly that it would be futile to support the Union;
3. By Margie Brown, in May or June 2002, in suggesting to Tyrone Holly that supporting the Union would be futile;
4. By Mark Wurgess in instructing CBC security guards to call the police at the first sign of union activity and by Respondent in calling the police to the McComb plant on May 21, 2002;
5. By Dan Kear, on May 21, 2002, in telling Sherri Todd that she could not be a temporary lead on account of her union activities on the previous night;
6. By erecting signs indicating video surveillance of areas in which prounion employees were congregating, on May 23, 2002;
7. By Susan Henry, in announcing to employees, that they could lose their Christmas bonus if they supported the Union;

[53] The *Meijer* court distinguished the decision in *United Parcel Service*, 41 F.3d 1068 (6th Cir. 1998) by the fact that UPS had the sole right under its collective bargaining agreement to promulgate and enforce appearance standards.

8. By James Keller, in telling employees that selecting the Union would cause Respondent to lose contracts and go bankrupt;

9. By Yolanda Means, in July 2002, in suggesting to Tyrone Holly that it was futile to support the Union;

10. By Betty Gerren on June 7, 2002, in threatening employees with stricter discipline if they chose to support the Union;

11. By a security guard, on or about June 14, 2002, in telling Cathy Hill that she could not distribute union literature on company property;

12. By Richard Quinn, in restraining and interfering with the protected union activities of Gary Hill and Thomas Thompson, and by placing a disciplinary note in each of their personnel files on or about June 27, 2002;

13. By Dennis Herod in suggesting to Thomas Thompson on or about August 1, 2002, that CBC President James Appold might move production lines out of the McComb facility if employees selected the Union;

14. By James Appold in August 2002, in suggesting to employees that benefits currently enjoyed would be lost if they selected the Union as their collective bargaining representative;

15 By assigning Tammy Medina more onerous work on or about August 11, 2002, due to her vocal support for the Union;

16. By Betty Gerren, on August 10, 2002, by telling William Lawhorn and other employees that Lawhorn would be fired if the Union lost the representation election;

17. By Dan Kear and Gary Birkemeyer, on or about August 13, 2002, by requiring Patti Wickman and Cathy Hill to remove magic marker messages supporting the Union from their arms;

18. By Kelly Frey, on August 21, 2002, in telling Thomas Thompson that his union was not around to protect him anymore.

Rulings on the Union's Objections to the Conduct of the Election[54]

I sustain the following of the Union's objections to the conduct of the election:

> Objection 2 (Complaint paragraph 15)—relating to James Keller's comments to employees in June 2002 in the mechanics supervisor's office;
>
> Objection 3 (Complaint paragraph 3)—relating to Betty Gerren's warning to employees on June 7, 2002;
>
> Objection 4 (Complaint paragraph 19)—relating to a security guard telling Cathy Hill that she could not distribute union material on CBC property;
>
> Objection 9 (Complaint paragraph 25A)—relating to the June 26 written warning issued to Russell Teegardin;
>
> Objection 25 (Complaint paragraph 26)—relating to Betty Gerren's comments to William Lawhorn and others on August 10, 2002;
>
> Objection 26—(Complaint paragraph 27)—relating to the assignment of more onerous duties to Tammy Medina;
>
> Objection 27—(Complaint paragraph 28)—relating to Dan Kear's instructions to Patti Wickman to remove prounion magic marker messages from her arms.

It is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period between the filing of a representation petition and the election. Conduct which violates Section 8(a)(1) interferes with the exercise of a free and untrammeled choice in the election. The Board departs from its usual policy only when the violation(s) is de minimis, i.e., conduct for which it is virtually impossible to conclude that the outcome of the election has been effected. In determining whether misconduct is de minimis the Board considers such factors as the number of violations, their severity, the extent of their dissemination, proximity to the election and the size of the bargaining unit, *Bon Appetit Mgt. Co.*, 334 NLRB 1042, 1044 (2001).

When considering whether a new election should be directed, the Board considers not only those violations which were the subject of objections by the Union but also any unfair labor practices discovered during the post election investigations—including those discovered during a consolidated proceeding before an administrative law judge, *White Plains Lincoln Mercury*, 288 NLRB 1133, 1138, 1139 (1988). When considering all the violations committed by CBC during the critical period, including those to which objection was not made or withdrawn, I conclude that the August 15, 2002 election should be set aside and a new election should be directed. I have, for example, considered the repeated efforts of Respondent to restrain and interfere with the ability of union supporters, particularly Russell Teegardin, but also Gary Hill, Thomas Thompson, Patti Wickman, Tyrone Holly and Cathy Hill, to disseminate their views.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I further recommend that the election of August 15, 2002 be set aside and that Case 7–RC–16402 be remanded to the Regional Director for the purpose of conducting a new election at such time as he deems that circumstances permit a free choice regarding a bargaining representative.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Because of the Respondent's egregious and widespread misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in

[54] The initial order consolidating the hearing on the objections with the hearing on unfair labor practices correlated the objection numbers with paragraphs in the February 2003 complaint. These numbers do not correlate with the paragraph numbers in the April 30, 2003 consolidated complaint.

any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[55]

ORDER

The Respondent, Consolidated Biscuit Company, McComb, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining and discharging employees from engaging in union or other protected activities;

(b) Threatening employees with adverse consequences if they select a union as their bargaining representative;

(c) Suggesting to employees that selecting a union as their bargaining representative would be futile;

(d) Maintaining policies that prohibit or inhibit the discussion of matters relating to the selection of a union while permitting the discussion of other non work-related subjects;

(e) Prohibiting the display of pro-union or antiunion insignias or markings in areas in which insignias or markings concerning other non work-related subjects are permitted;

(f) Prohibiting or interfering with the display of support for the Union, verbal dissemination of opinion supporting the Union and/or the distribution of union literature on the exterior of the plant [to include such activities by Respondent's employees on Respondent's property at the exterior of the plant];

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer William Lawhorn, Russell Teegardin, John Green, Gary Hill, Thomas Thompson, Tyrone Holly and Patti Wickman full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make William Lawhorn, Russell Teegardin, John Green, Gary Hill, Thomas Thompson, Tyrone Holly and Patti Wickman whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its McComb, Ohio plant copies of the attached notice marked "Appendix."[56] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 21, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(g) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. January 14, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Bakery, Confectionary, Tobacco Workers and Grain Millers International Union (BCTGM) or any other union.

WE WILL NOT threaten you with adverse consequences if you select the BCTGM or any other union as your collective bargaining representative.

[55] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[56] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT suggest to you that selecting the BCTGM or any other union as your bargaining representative would be futile.

WE WILL NOT prohibit or restrain you from discussing matters related to whether or not you wish to select a union as your bargaining representative—so long as you do not restrain, coerce or interfere with the exercise of other employees' protected rights or interfere with production activities.

WE WILL NOT prohibit you from wearing or displaying prounion or antiunion insignias or messages—unless these messages restrain, coerce or interfere with the exercise of other employees' protected rights, or you are in an area in which no nonwork related insignias or messages can be worn or displayed.

WE WILL NOT prohibit or interfere with your display of support for, or opposition to, the BCTGM or any other union, or your distribution of prounion, or antiunion literature on the exterior of our facility, including company property, unless your activities restrain, coerce or interfere with the exercise of the protected rights of other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer William Lawhorn, Russell Teegardin, John Green, Gary Hill, Thomas Thompson, Tyrone Holly and Patti Wickman full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make William Lawhorn, Russell Teegardin, John Green, Gary Hill, Thomas Thompson, Tyrone Holly and Patti Wickman whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of William Lawhorn, Russell Teegardin, John Green, Gary Hill, Thomas Thompson, Tyrone Holly and Patti Wickman, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

CONSOLIDATED BISCUIT COMPANY